LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 15 1967
JOHN F. DAVIS, CLERK

No. 820

In the Supreme Court

of the

United States

October Term, 1967

Thrifty Shoppers Scrip Co., *Appellant*

v.

United States of America, Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc., Thrifty Drug Stores Co., Inc., and Von's Grocery Co.

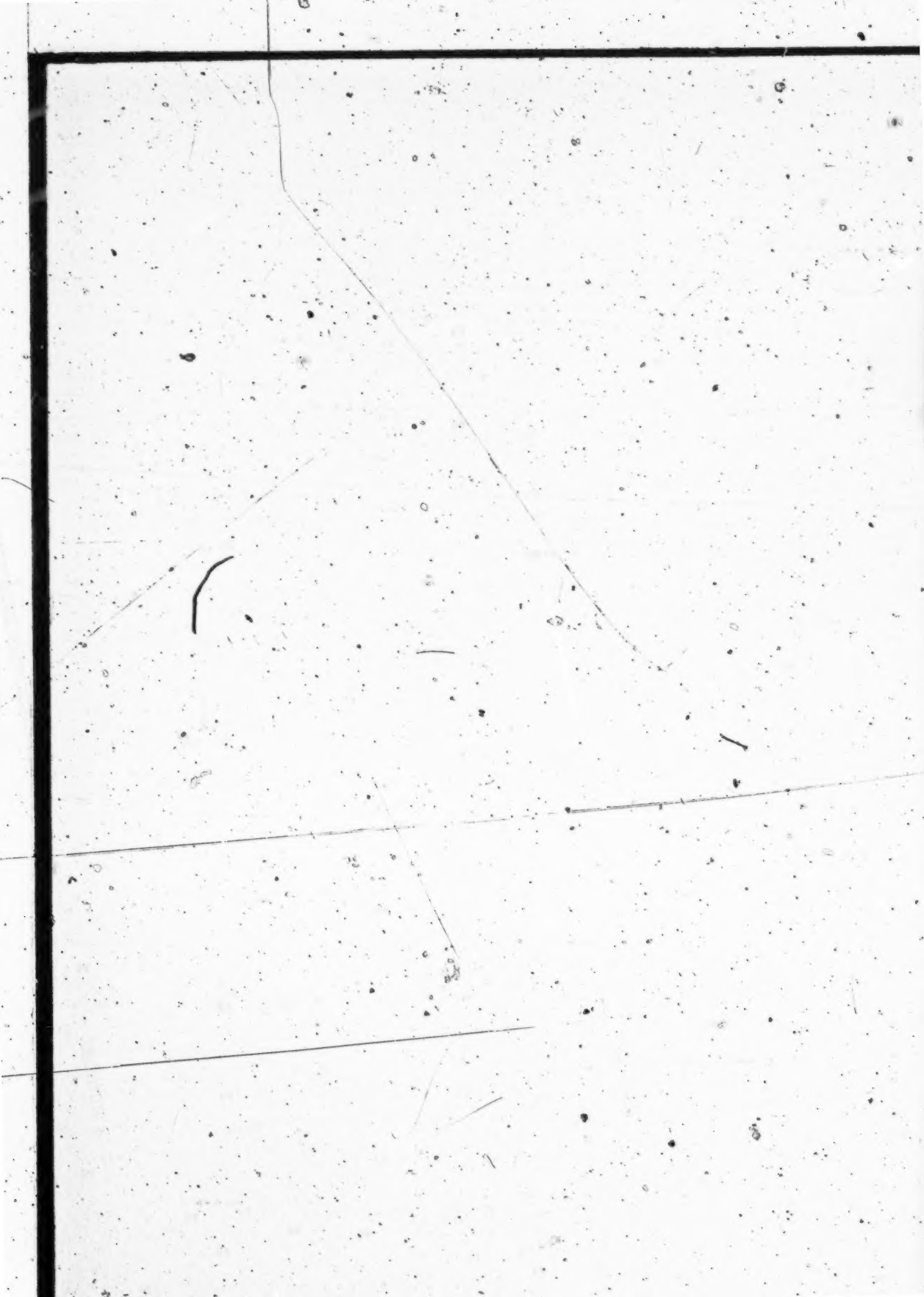
On Appeal from the United States District Court
for the Central District of California

Jurisdictional Statement

David B. Gold
105 Montgomery Street
San Francisco, California 94104

Counsel for Appellant,
Thrifty Shoppers Scrip Co.

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105



INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
(1) Description of Thrifty Shoppers	3
(2) The complaint	4
(3) Proceedings subsequent to the complaint	6
The questions are substantial	15
Conclusion	28
Appendix A—Opinion of district court, filed August 18, 1967	App. 1
Appendix B—Order of district court, entered August 3, 1967	App. 19
Appendix C—Final judgment of district court, entered June 5, 1967, as lodged April 28, 1967, with copy of outlines of alternative reorganization plans and copy of letters with respect thereto to be lodged with proposed final judgment	App. 23
Appendix D—Sections 1, 2 and 4 of Sherman Act	App. 47
Appendix E—Rule 24 of Federal Rules of Civil Procedure	App. 47
Appendix F—Section 2 of Expediting Act of February 11, 1903	App. 48

TABLE OF AUTHORITIES CITED

Cases	Pages
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129	2, 19, 20, 24, 27
International Boxing Club of N.Y. v. United States, 358 U.S. 242 (1959)	17
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948)	22
Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502	2, 20
Purity Stores, Inc. v. Blue Chip Stamp Company, 1963 Trade Cas. ¶ 70,895 (N.D.Cal. 1963)	10, 27
Sam Fox Publishing Company v. United States, 366 U.S. 683 (1961)	20
United States v. Crescent Amusement Co., 323 U.S. 173 (1944)	23
United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961)	22, 24, 25, 27
United States v. Grinnell Corp., 384 U.S. 563 (1966)	16
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	22
United States v. Sealy, Inc., ... U.S. ....., decided June 12, 1967, 1967 Trade Cas., ¶ 72,125	15
United States v. Von's Grocery Company, 233 F.Supp. 976 (S.D. Cal. 1964)	4

Statutes	
Expediting Act, Section 2, 32 Stat. 823, as amended 15 U.S.C. 29	2, 3
Federal Rules of Civil Procedure, Rule 24	1, 3, 18, 19
Sherman Act:	
Section 4, 15 U.S.C. 4	2, 3
Sections 1 and 2, 15 U.S.C. 1 and 2	2, 3
28 U.S.C. § 2718 App.	3

Text	
Barron & Holtzoff, Fed. Prac. & Pro., Vol. 2, ¶ 594	20

No.

In the Supreme Court

of the

United States

October Term, 1967

Thrifty Shoppers Scrip Co., *Appellant*

v.

United States of America, Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc., Thrifty Drug Stores Co., Inc., and Von's Grocery Co.

On Appeal from the United States District Court for the Central District of California

---

Jurisdictional Statement

Appellant Thrifty Shoppers Scrip Co., hereinafter referred to as Thrifty Shoppers, appeals from the order of the United States District Court for the Central District of California entered in *United States of America v. Blue Chip Stamp Company et al.* on August 3, 1967, which, *inter alia*, denied Thrifty Shoppers' motion filed on July 12, 1967 (a) to intervene under Rule 24 of the Federal Rules of Civil Procedure and (b) for an order vacating the final judgment entered on June 5, 1967. Thrifty Shoppers also appeals from the final judgment entered below on June 5, 1967. Appellant

submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Central District of California, filed on August 18, 1967, has not been officially reported. Copies of the opinion, the order entered on August 3, 1967, and the final judgment entered on June 5, 1967, are attached hereto as Appendices A, B and C.

JURISDICTION

This is a civil antitrust action brought by the United States under Section 4 of the Sherman Act, 15 U.S.C. 4, to abate violations of Sections 1 and 2 of the Act, 15 U.S.C. 1 and 2.

The final judgment of the district court was entered on June 5, 1967. The order denying Thrifty Shoppers' motion to intervene and to vacate the judgment was entered by the district court on August 3, 1967. The notice of appeal was filed in that court on August 4, 1967. The jurisdiction of the Supreme Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129; *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502.

QUESTIONS PRESENTED

Where the Government has brought an action challenging the legality under the antitrust laws of a monopolistic combination by a group of competing retail grocery chains doing more than $1,500,000,000 annual business in California that have jointly created and operated a trading stamp company for the purpose and with the effect of eliminating competition and achieving a monopoly in the trading stamp market,

and a consent judgment has been entered which will have the effect of preserving such monopoly and which does not put an end to the combination or deprive the defendants of the benefits of their illegal conduct:

(a) May a competing trading stamp company whose existence is threatened by said monopoly be denied the right to intervene in said action for the purpose of seeking to set aside and of appealing from the judgment so entered?

(b) Was the district judge justified in entering such judgment because he considered that it was necessary to do so in order to preserve competition in another line of commerce, namely, the retail grocery industry, and should such judgment be allowed to stand?

STATUTES INVOLVED

Sections 1, 2, and 4 of the Sherman Act, 15 U.S.C. 1, 2 and 4, are attached hereto in pertinent part as Appendix D. Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. App. following § 2718, is attached hereto as Appendix E. Section 2 of the Expediting Act of February 11, 1903, 15 U.S.C. 29, is attached hereto as Appendix F.

STATEMENT

(1) Description of Thrifty Shoppers

Thrifty Shoppers has been engaged in the trading stamp business in California since prior to World War II. The volume of its business, which amounted to $1,364,426 in 1955, before the formation of Blue Chip, fell to $725,813 in 1963. (See plaintiff's answers to defendant Thriftimart's interrogatories pursuant to court's order of July 7, 1966, filed August 3, 1966, answer to interrogatory No. 2 a through d, pp. 16-17.) On April 25, 1967, it instituted a private treble damage action against the defendants herein. In its complaint, Thrifty Shoppers prayed, among other things, that each of the defendant retailers be required to divest itself

of ownership of all stock in Blue Chip and that Blue Chip be enjoined from issuing any trading stamps to any of the defendant retailers.

(2) The complaint

The Government's complaint, filed on December 26, 1963, alleged that eight large retail grocery chains in California and the largest chain of retail pharmacies in the state had been engaged since 1955 in a conspiracy in restraint of trade both in the retail grocery business and in the trading stamp business and that these defendants had conspired to monopolize, had attempted to monopolize and had monopolized the trading stamp business in California in violation of Sections 1 and 2 of the Sherman Act. The complaint alleged that the defendant grocery chains in 1962 did about $815,000,000 in sales in the Los Angeles area* and about $1,597,000,000 in sales in California, which represented 51 percent of all sales made by chain grocery stores in the Los Angeles area and approximately 37 percent of all sales made by such stores in California.

The complaint alleged that the defendants carried out their conspiracy by organizing the defendant Blue Chip Stamp Company as a trading stamp company in 1956 and by maintaining control of the stock of the company, of its board of directors and of its policies and practices. The terms of the conspiracy alleged by the Government were,

---

*In *United States v. Von's Grocery Company*, 233 F.Supp. 976, 980 (S.D. Cal. 1964), the district court's decision included a table listing the nine leading grocery chains in Los Angeles in 1958, after giving effect to the merger of Shopping Bag Food Stores into Von's. Of these, the leading five—accounting for total sales of 650 million dollars and 32.1 percent of the market—are defendants herein. Their individual rank and share of the market were as follows: 1. Von's-Shopping Bag, 8.9 percent; 2. Safeway, 8 percent; 3. Ralphs, 6.4 percent; 4. Market Basket, 4.4 percent; 5. Thriftimart, 4.4 percent.

among others, that the defendant retailers would use no trading stamp in any area in California except by agreement and that they would then use Blue Chip; that they would boycott all trading stamp companies other than Blue Chip; that the defendants and co-conspirators would cause the Blue Chip stamp service to be sold at or about cost to prevent other trading stamp companies from effectively competing with Blue Chip; that the use of Blue Chip stamps would be licensed to any retailer in the area of Blue Chip's operation but only on condition that the retailer would use Blue Chip stamps exclusively; that competition among the defendant supermarkets, and between the defendants and other retailers, in the use of trading stamps would be eliminated; and that the defendants would take whatever additional action that was necessary to achieve and maintain a monopoly position in the trading stamp business in California.

The complaint further alleged that Blue Chip stamps were introduced into the Los Angeles area in January, 1960, and that by 1962 Blue Chip was doing about $43,000,000 business in that area, representing approximately 81 percent of all trading stamps issued in the Los Angeles area. In the same year, the complaint alleged, Blue Chip was doing approximately $70,000,000 business in California, representing approximately 71 percent of all trading stamps issued in the state.

In 1956, the complaint alleged, there were approximately 53 trading stamp companies doing business in California, and, of these, 40 were out of business at the time that the Government sued.

In its prayer for relief, the Government, in addition to seeking injunctive relief against the monopolistic conspiracy, asked that each of the defendant retailers be required to divest itself of all of its stock in Blue Chip and that it be

required to cease issuing Blue Chip stamps to its customers.

On December 15, 1966, in giving his reasons for his refusal to sign a consent judgment earlier submitted to him in this action, the district judge informed the parties of the weight he would accord to the allegations of the Government's complaint in his determination of the terms of the final judgment by consent he would enter:

> "In deciding whether or not to decide to sign the proposed consent decree, I have to take as an established fact the allegations contained in the Complaint, and for the purposes of my discussion this afternoon I will accept as being conclusively proved the allegations of the Government concerning all of the defendants who are before the court." (Tr., December 15, 1966, p. 401).

(3) Proceedings subsequent to the complaint

Defendants filed their answers in March and April, 1964. Between May, 1964, and September, 1966, the parties engaged in pre-trial discovery proceedings. The Government served upon defendants three sets of interrogatories and five requests for admissions. In addition, the Government responded to interrogatories propounded by defendants. The following are among the facts adduced in the course of discovery:

Blue Chip Stamp Company was incorporated in May, 1956, by competing grocery chains in California, most of whom primarily were doing business in the Los Angeles area. The incorporators were officials of the defendants Thriftimart, Inc.*, Ralphs Grocery Company, Von's Grocery Company, Market Basket, Alexander's Markets, Safeway Stores, Incorporated, and Purity Stores, Inc., along with an official of Shopping Bag Food Stores (acquired

*Immediately prior to the formation of Blue Chip, Roger M. Laverty, Thriftimart's representative as an incorporator and original member of the board of directors of Blue Chip, said to a

by Von's in 1960) and officials of three other grocery chains. (See answers of Blue Chip to plaintiff's first request for admissions, filed June 5, 1964, answer to statement No. 25, and answers of Blue Chip to plaintiff's second request for admissions, filed November 16, 1964, answer to statement No. 20.)

In the "Offering Circular" issued by Blue Chip Stamp Company in June, 1956, with respect to the issuance of its stock, Blue Chip stated that it was the belief of the organizers of Blue Chip that the distribution of trading stamps, particularly by food markets, "is detrimental to the merchants, their customers and suppliers" and that "purchasers of the Company's shares should not regard the shares as an investment upon which they are likely to receive any substantial monetary return." (See answers of Blue Chip to plaintiff's third request for admissions, filed October 4, 1965, answer to statement No. 10.)

Blue Chip was authorized by its Articles of Incorporation to issue two classes of stock, Class A and Class B. The holders of Class A shares, voting separately as a class, were entitled to elect nine of the eleven directors and the holders of the Class B shares, voting separately as a class, were entitled to elect the remaining two directors. Throughout fiscal years 1957-63 and on February 1, 1964, Class A shares were owned by the nine defendant retailers (along with Shopping Bag, until it was acquired by Von's, and, until 1959, by Alpha Beta Food Markets, Inc., which withdrew from Blue Chip and sold its stock to certain of the

---

meeting of grocers on or about April 10, 1956, that he had called the meeting with the consent of a committee formed by eight of the leading food chains in Los Angeles and that: "We are forming an organization for the purpose of eliminating trading stamps as we feel they are a parasite in the food industry." (See plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 43, pp. 138-139.)

defendants), and from June 30, 1956, to February 1, 1964, officials of all retailer defendants sat on Blue Chip's board, except for brief time periods as to three retailer defendants. (See answers of Blue Chip to plaintiff's first request for admissions, filed June 5, 1964, answers to statements Nos. 24 and 25, and answers of Blue Chip to plaintiff's second request for admissions, filed November 16, 1964, answers to statements Nos. 21 and 22.)

The total retail sales of the defendant chains which owned the Class A stock of Blue Chip, at the time of the formation of the joint venture and in 1963 (subject to immaterial variations), were as follows:

Year	Sales in California	Sales in Los Angeles and Orange Counties
1956	$1,083,154,885	$584,238,267
1963	1,864,525,581	984,439,038

(See answers of Blue Chip to plaintiff's third request for admissions, filed October 4, 1965, answer to statement No. 9.)

Blue Chip did not expand its area of operations into the Los Angeles area until January 4, 1960, when it did so pursuant to a resolution of its board of directors adopted on September 15, 1959. At that time, Blue Chip's operations were conducted pursuant to the following resolution adopted by its board of directors on May 18, 1956:

> RESOLVED that trading stamps issued by this corporation shall not be issued in any area unless authorized by resolution adopted by the affirmative vote of not less than eight directors of this corporation.

At an earlier meeting of the board of directors held October 4, 1956, a resolution which would have authorized issuance of Blue Chip stamps in the Los Angeles area after January 1, 1957, had been defeated. (See answers of Blue

Chip to plaintiff's second request for admissions, filed November 16, 1964, answers to statements Nos. 23 and 33, and plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 36A and 36B, at p. 119.)

The growth of Blue Chip following its entry into the Los Angeles area in January, 1960, is evidenced by the fact that Blue Chip sales increased from $10,001,027 for the fiscal year ended June 30, 1959, to $80,916,287 for the fiscal year ended February 28, 1966, and that during the same period the number of trading stamps issued by Blue Chip increased from 5,686,250,000 to 51,100,722,200. (See answers of Blue Chip to plaintiff's first request for admissions, filed June 5, 1964, answers to statements Nos. 7 and 9, and answers of Blue Chip to plaintiff's second set of interrogatories, filed May 10, 1966, answers to interrogatories Nos. 3, 4, 5 and 6.)

On the basis of information supplied to the Government by Blue Chip and by other trading stamp companies and information supplied to the Director of the California State Division of Corporations pursuant to the California Trading Stamp Act of 1961, the Government, in response to interrogatories propounded by defendant Thriftimart, estimated that Blue Chip accounted for the following percentages of stamp service sales and of stamps issued in the California and Los Angeles area markets in 1964:

	Percent of Trading Stamp Market
California	
Stamp service sales by Blue Chip in dollars	66.5 percent
Number of stamps issued by Blue Chip	76.2 percent
Los Angeles Area	
Stamp service sales by Blue Chip in dollars	79.8 percent
Number of stamps issued by Blue Chip	86.4 percent

(See plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 1 F, pp. 5-8.)

The extent to which Blue Chip defendant stockholders participated in the use of Blue Chip was as follows in 1965-1966:

Defendant Retailer	No. of Blue Chip Stamps Issued	Amount Paid to Blue Chip
1. Alexander's Market	231,550,000	$ 352,571
2. Lucky Stores, Inc.	1,193,080,000	1,847,370
3. Market Basket	1,182,300,000	1,800,582
4. Purity Stores, Inc.	1,239,000,000	1,916,175
5. Ralphs Grocery Co.	1,313,460,000	2,000,053
6. Safeway Stores, Inc.	6,514,735,000	10,034,262
7. Thriftimart, Inc.	1,515,010,000	2,331,826
8. Von's Grocery Co.	2,344,275,000	3,570,459
9. Thrifty Drug Stores Co. Inc.	1,590,965,000	2,465,996

These totals represent 33.5 percent of all of the stamps issued by Blue Chip during the 1965-66 fiscal period and 32 percent of all Blue Chip stamp revenues in California.

(See answers of Blue Chip to plaintiff's second set of interrogatories, filed May 10, 1966, answer to interrogatory No. 11.)

A majority of Blue Chip's business has been done with large chain grocery and drug stores, including the retailer defendants. As of March, 1964, twenty-five organizations accounted for approximately 54 percent of Blue Chip's business. The remaining share of the business was divided among 12,451 other customers. (See answers of Blue Chip to plaintiff's third request for admissions, filed October 4, 1965; answers to statements Nos. 1, 2, 3 and 4.)

In addition to facts brought to light in discovery, it should be noted that in *Purity Stores, Inc., v. Blue Chip Stamp Company*, 1963 Trade Cas. ¶70,895 (N.D.Cal. 1963), an action brought in 1963 by Purity, a defendant in this case, to prevent Blue Chip from cutting it off because

Purity had chosen to vary the rate at which it issued Blue Chip stamps to its customers, the trial court found that Blue Chip was the dominant trading stamp company in Northern California, "having in excess of 75% of the trading stamp business." (Finding of Fact No. 7).

Between early 1965 and July 22, 1966, the parties engaged in settlement negotiations. On July 22, 1966, the parties, with the exception of Thriftimart, Inc., and Market Basket, filed a stipulation consenting to the entry of a final judgment. Among other things, this judgment required Blue Chip to cease issuing stamps and to create two new stamp companies by March 1, 1969, one of which was to take over the Blue Chip business in Northern California and the other in Southern California. Neither of these companies was to be permitted to use the name "Blue Chip". If, during a designated period, either new company distributed for use in retail stores in its market "trading stamps which convert to 30% or more of the retail food store sales in that area" the court could impose certain prescribed restrictions on issuance of stamps for a period of one year. On October 3, 1966, the Government withdrew its consent to this proposed judgment.

On October 28, 1966, the parties, again with the exception of defendants Thriftimart, Inc., and Market Basket, entered into and filed a stipulation agreeing to the entry of a revised consent judgment. This decree was essentially identical to the original consent judgment, except that it provided for the creation of a single new company rather than two.

On December 15, 1966, the district judge announced after oral argument that he was not going to sign this decree. *In so doing, he set forth certain provisions which he considered should be included in any judgment entered by him.* These included preservation of the right of the company to use the name "Blue Chip", the right of the company to

retain present management, a provision that the company should be one operated for profit, elimination of any provision for a "rollback" in the volume of business done by Blue Chip with retail grocers and the submission in two or three years of a plan for the sale of one-third of Blue Chip's business. (Tr., December 15, 1966, pp. 404-408). The district judge, in setting forth the terms upon which he considered that a sale should be made, recognized that there might ultimately be no divestment, saying: "It is entirely possible that nobody would ever buy under those terms and conditions * * *." (Tr., December 15, 1966, p. 407).*

On April 28, 1967, the parties entered into and filed a third stipulation consenting to the entry of a final judgment. Under this proposed decree, the trading stamp company was permitted to retain the name "Blue Chip". The defendants were to present to the court within sixty days a plan for the reorganization of Blue Chip which was to be substantially in accordance with either of two plans which had been previously furnished to the Government by defendants. Under each plan, the stock in Blue Chip was to be reclassified and issued as follows: 45 percent of the stock to present shareholders (about 90 percent of which stock—or 40.5 percent of all stock—would go to retailer defendants in this action); approximately 42.5 percent to retailers who had used Blue Chip since March 1, 1964, their right to purchase stock being tied to the pur-

*The possibility that no one would buy this one-third of the Blue Chip business exists, among other reasons, because Blue Chip would be permitted to come back into the area in one year and to solicit retailers it had only recently given up as accounts and among those retailers there would be large numbers who would themselves be holders of Blue Chip stock and debentures. Another deterring factor would be the requirement that whoever purchases the divested business must agree to engage in the trading stamp business for a reasonable time.

chase by them of Blue Chip debentures; approximately 2.5 percent to the public; and 10 percent to existing management. Since 80 percent of the stock going to management was to be reserved for issuance to employees over a period of years, under a stock option plan, the percentages of stock in the hands of retailer defendants would necessarily be in excess of the 40.5 percent referred to above for a considerable number of years. Further, during the crucial initial period of reorganization, defendants' share would be increased even more to the extent that users failed to exercise their rights to purchase stock and debentures. (Under the plan of reorganization as ultimately submitted to the court on August 3, 1967, and approved by the court on August 31, 1967, 621,600 shares of the authorized capitalization of 1,400,000 shares would be offered to present shareholders, 621,600 shares would be offered to other retailers who have used Blue Chip (their right to purchase stock being tied to their purchases of Blue Chip debentures), 27,600 shares would be offered to management and 110,400 shares would be made available to key employees over a period of years. No shares would be offered to the public at the time of reorganization. The court's order of August 31, 1967, provided that when permanent directors are ultimately elected they are then to present a plan for disposition of all unsubscribed shares.)

Each of the retailer defendants receiving shares was required to deposit them for ten years in a separate trust, with full voting powers vested in separate trustees. Under the judgment, each of the retailer defendants was enjoined from having as an officer, director or employee any person who was also an officer, director or employee of the reorganized company and from exercising any right which it might acquire to vote for the election of any official of the reorganized company although such defendant was permit-

ted to "cause such right to be exercised independently by a financial institution or other party acceptable to plaintiff or approved by the Court." Similar limitations were imposed on those who might be employed by the reorganized Blue Chip.

Within 30 months after the reorganization, the reorganized Blue Chip was to present for the approval of the court a plan under which it would offer for sale one-third of its then existing business in California. This business was to be located within a contiguous area within Southern California. The decree set no limitation on the time by which the sale must be completed and the sale was conditioned upon certain requirements established by the court, referred to *supra*, fn. at p. 12. The court, as noted, foresaw that such sale might never take place and the State of California in its brief *amicus curiae*, filed May 29, 1967, in support of this judgment, emphasized that the judgment "does not mandate approval [of the sale]" or even "the effectuation of the sale." (Brief, p. 16).

The judgment contained general provisions enjoining the defendants from conspiring or from monopolizing the trading stamp business. It also included, *inter alia*, a prohibition against refusing to provide a trading stamp service to a retailer by reason of the rate at which he issued stamps, the use by the retailer of another stamp than Blue Chip, or the presence in the locality of another establishment using Blue Chip.

On May 17, 1967, Thrifty Shoppers, pursuant to leave granted, filed a brief *amicus curiae* opposing entry of the proposed judgment.

On June 5, 1967, the court heard oral argument by Thrifty Shoppers and others, and thereupon entered the proposed judgment. In response to Thrifty Shoppers' counsel's statement of the serious economic injury which would be done to

small trading stamp companies under the judgment, the district judge stated: "[T]here is a business in California which is more important than the stamp industry, and that is the grocery industry" and "I will do all I can to preserve competition in the stamp industry but I will not do it at the risk of an industry which is more important to the economy of the State of California than the stamp industry." (Tr., June 5, 1967, pp. 46-47).

On July 12, 1967, Thrifty Shoppers filed a motion for an order granting it the right to intervene and for an order vacating the judgment. On August 3, 1967, this motion was denied by the court.

THE QUESTIONS ARE SUBSTANTIAL

As the district judge recognized, the case and the decree which he entered are of great economic importance:

> "It appears that the case, without any question, is a case of unusual quality. The economic ramifications are probably greater within a narrower geographical aspect, however, than any like case that has been presented before, because the case not only concerns a monopoly within the trading stamp industry in California, but whatever is done by this court will have a tremendous impact upon the economy of the State, not only the economy of the S&H and any trading stamp companies that want to come in but upon the entire retail, wholesale and consumer industry." (Tr., December 15, 1966, p. 402-403).

The legal questions presented are no less significant. Here competitive retail grocery chains, doing more than $1,500,000,000 annual business, have been engaged in an unlawful horizontal joint venture. As in *United States v. Sealy, Inc.*, ... U.S. ....., decided June 12, 1967, 1967 Trade Cas., ¶ 72,125, the defendants have utilized as their instru-

mentality a corporation, here Blue Chip Stamp Company, organized by them and controlled and operated by them, for the purpose of carrying out an "aggregation of trade restraints." Just as in *Sealy,* these defendants have owned substantially all of the stock of Blue Chip Stamp Company, controlled its board of directors and exercised dominion over the operations of the company. The Government's complaint alleged, and the record on discovery demonstrated, that the chain defendants had agreed upon the terms and conditions upon which Blue Chip stamps would be used by them and by other retailers, that Blue Chip had achieved an overwhelmingly monopolistic position in the trading stamp business in California, and that the defendants engaged in *per se* violations of the antitrust laws, including a boycott of other trading stamp companies and limitation by agreement of the territories in which Blue Chip would be permitted to operate.

The language of *United States v. Grinnell Corp.,* 384 U.S. 563 (1966), in describing the facts of that monopoly is directly apposite here. The Court said that the offense of monopoly has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. In *Grinnell,* the Court had no problem "as what was done in building the empire was done plainly and explicitly for a single purpose." The same is even more true here—where the defendants formed and operated a corporation to accomplish their purpose of monopolizing the trading stamp business. In *Grinnell,* the Court said that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market" and referred to the 87 percent of the business held by the defendants and the fact that "they did not hesitate to wield"

their power. Here, the defendants clearly had a predominant share of the market—running to 76.2 percent in California and 86.4 percent in the Los Angeles area—and the record shows that they didn't hesitate to wield their power to, among other things, boycott other trading stamp companies and to control by agreement the terms and conditions upon which they would use Blue Chip stamps and the areas in which they would use them.

This Court has said that a decree should

> "(1) put 'an end to the combination or conspiracy when that is itself the violation'; (2) deprive 'the antitrust defendants of the benefits of their conspiracy'; and (3) 'break up or render impotent the monopoly power which violates the act'."

International Boxing Club of N.Y. v. United States, 358 U.S. 242, 253 (1959). None of these prerequisites has been met by this decree. The monopolistic combination and its power have been preserved by tying to Blue Chip by stock ownership not only the defendant retailers but also the thousands of other retailers who have been using Blue Chip stamps and who now would be afforded the opportunity under the decree of owning stock and debentures in Blue Chip. The defendants have been permitted to retain stock in Blue Chip in proportions which will insure their ability to control the corporation, particularly since present Blue Chip management, whom they installed, will not only remain but will receive considerable stock. The defendants are being permitted to continue to use Blue Chip stamps and to reap enormous profits which, through their conspiracy, now inhere in the name "Blue Chip".

In short, this case is one in which (a) the established facts of record are flagrantly violative of the antitrust laws and (b) the decree entered by the lower court on its face leaves in being a monopolistic combination. Under those

circumstances, such discretion as may reside in the Department of Justice in negotiating consent judgments has no application. An antitrust decree, simply because it has been entered by consent, cannot ignore the principles announced by this Court (and, in this case, at an earlier stage espoused by the Government*) for the dissipation of monopolistic power. This is not a case in which a third party is seeking to intervene to ask one type of relief in preference to another; it is instead one in which the standards laid down by this Court have been rejected.

1. The threshold question to be considered is whether Thrifty Shoppers had a right under Rule 24(a) of the Federal Rules of Civil Procedure to intervene in the action for the purpose of seeking to set aside the inadequate decree and of appealing from it. Rule 24(a)(2), as amended, provides that there may be intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

An applicant for intervention must, first, claim that he has "an interest relating to the property or transaction which is the subject of the action." The transaction which is the subject of the action herein is the conspiracy in which defendants engaged and the operation of the trading stamp company which they unlawfully formed. The Government

*In its memorandum filed on November 28, 1966, relating to an earlier decree, the Government said that it had "refused to settle, as originally requested by defendants, on any terms which would not guarantee to the public that Blue Chip's illegally-acquired monopoly be dissipated" and that it would not settle the case on terms to permit Blue Chip "to maintain its illegally-acquired monopoly position" or "to transfer such monopoly position * * * to * * * wholesale and retail grocers." (p. 9).

alleged that one of the effects of defendants' offenses was that "[t]rading stamp companies which have competed with or which desire to compete with Blue Chip in the trading stamp business in California have been denied the opportunity to do so in a competitive market." (Complaint, ¶ 27(d)). Since Thrifty Shoppers is one of the trading stamp companies which have attempted to compete with Blue Chip and which will be affected by the decree which insures the continued monopoly of Blue Chip, it clearly has an interest relating to the transaction which is the subject of the action. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129.

Second, a showing must be made that the prospective intervenor "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." In 1966 the Advisory Committee when making a revision of Rule 24(a) said, *inter alia*:

> "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene * * *."

Because the decree preserves defendants' monopoly in the trading stamp business in California, it will impair Thrifty Shoppers' ability to continue in existence and will substantially affect its business. In the private action which it has brought against the defendants herein, Thrifty Shoppers has sought the relief denied by the court below. While the present decree will not be legally binding in that private action, nevertheless, as a practical matter, there is little likelihood that the same court which rejected even the limited relief sought in the decree lodged on October 28, 1966, will grant more effective relief in a private action.

As the court pointed out in *Sam Fox Publishing Company v. United States*, 366 U.S. 683, 694 (1961):

> "* * * there is considerable weight to the argument that the court will feel constrained as a matter of comity at least to build on the foundations of the present decree."*

Third, the applicant must show that his interest is not "adequately represented by existing parties." The best evidence of this inadequate representation by the Government is the decree to which it consented; as is demonstrated, the decree totally fails to restore competition in the trading stamp industry in California.

Fourth, the application for intervention must be "timely". The purported tardiness of Thrifty Shoppers and the other applicants in filing their motions for intervention was one of the principal reasons given by the court for denying the applicants' right of intervention. This basis for the trial court's action is without foundation. It is established that intervention may be allowed after entry of a final decree. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129; *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502; Barron & Holtzoff, *Fed. Prac. & Pro.*, Vol. 2, ¶ 594. In the circumstances of the instant case, any prior application would have been premature and would have had no practical effect. On April 28, 1967, the present final judgment was lodged with the court. Non-parties who objected to the decree were granted

---

*In the *Sam Fox* case intervention as of right was denied on the ground that Rule 24(a) then provided that to secure intervention as of right the applicant must show that it "is or may be bound by a judgment in the action." The rule, however, no longer requires a showing that the judgment be binding; it is sufficient that the applicant demonstrate "that the disposition of the action may *as a practical matter* impair or impede his ability to protect [his] interest." (Emphasis added.)

the right to file briefs *amici curiae* under the procedure followed by the trial court. On May 17, 1967, Thrifty Shoppers filed (and served on the Government and all other parties) a brief *amicus curiae* setting forth its objections to this proposed judgment and on June 5, 1967, argued orally before the court in opposition to the decree. Its arguments were rejected and the final judgment was entered on that date. The district court noted in its opinion that the applicants had "been given every opportunity to be heard" with respect to the final judgment. If Thrifty Shoppers' arguments had been successful, there would of course have been no need to intervene. Intervention became a necessity only after the decree was entered. Thrifty Shoppers filed its motion to intervene and to vacate the judgment on July 12, 1967, and the motion was denied by minute order of July 31, 1967, and by formal order of August 3, 1967, all of which dates were within the sixty-day period during which a party may appeal from a final judgment in an antitrust proceeding such as this one. Thrifty Shoppers' motion was also filed prior to the submission by the defendants on August 3, 1967, of a plan of reorganization as required by ¶ V of the June 5th final judgment. Thrifty Shoppers filed its notice of appeal on August 4, 1967. The fact that Thrifty Shoppers did not file its motion at an earlier stage has therefore caused no delay or prejudice to the proceeding or to any party.

2. The thrust of the position adopted by the district judge in rejecting the October 28, 1966, decree and in prescribing the terms of and approving the decree entered June 5, 1967, was that notwithstanding the illegality of Blue Chip, which, as noted *supra*, at p. 6, the court expressly assumed, nevertheless Blue Chip must be perpetuated since the district judge considered the stamps which it issued to be essential to the survival of the smaller retail

firms which competed with the retailer defendants. He appeared clearly to deem it not significant that as a result of the continuation of the Blue Chip monopoly competitors in the trading stamp industry would have little chance for survival. The record is void of support for his assumption and crucial determination that the preservation of Blue Chip is essential for the survival of smaller retail grocery stores. But even if there were factual grounds for this position there is no possible legal basis for his conclusion that a monopoly in one industry may be justified by the purportedly desirable economic effects which it may have in another. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) the court pointed out that an otherwise unlawful merger:

> "* * * is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A choice of such magnitude is beyond the ordinary limits of judicial competence * * *."

See also *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U.S. 219, 242-243 (1948).

The essence of the district court's position was that if a monopoly in one industry has become so all-embracing that to bring it to an end may in some degree have adverse consequences upon some competitors in another industry (at least until the evils brought on by the monopoly have been rooted out) then the monopoly must be left in being. This approach cannot be squared with *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), in which, in response to the argument of "possible harsh consequences" which would accompany complete divestiture, this Court said that "[i]f our examination persuades us that the remedy decreed leaves the public interest in the elimi-

nation of the tendency inadequately protected, we should be derelict in our duty if we did not correct the error."

The Government, in its memorandum filed on November 28, 1966, in support of the proposed decree lodged on October 28, 1966, had rejected the very grounds on which the court later relied in approving the decree. It stressed that the

> "* * * contention that an illegally acquired monopoly position in the trading stamp business should be allowed to exist because of * * * speculations as to what the effect of competition in the trading stamp business might be on competition in the grocery business is inconsistent with all of the [cited] cases and the only other [relevant cases] * * *." (p. 9).

This position was abandoned by the Government when it consented to the decree entered on June 5, 1967.

3. As the result of the court's incorrect conclusions as to the legal standards to be applied in fashioning relief in antitrust cases brought by the Government, it prescribed and approved a decree which was patently inadequate to dissipate the monopoly whose illegality was assumed and in so doing failed to comply with the minimum requirements for an antitrust decree which have been established by this Court. To the contrary the lower court placed its imprimatur upon the unlawful combination of Blue Chip, virtually guaranteeing its continuing existence.

First, the retailer defendants have been permitted under the decree to retain an ultimate stock interest of 40.5 percent in Blue Chip and, as noted earlier, during the initial period of reorganization considerably in excess of that amount. This Court said in *United States v. Crescent Amusement Co.*, 323 U.S. 173, 190 (1944):

> "The fact that the companies were affiliated induced joint action and agreement. Common control was one

of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunities for these exhibitors to continue to act in combination against the independents."

The fact that the shares will be placed in separate voting trusts for ten years can have little practical effect on the exercise of control by the defendant stockholders. The lawful obligation of the trustees will be to protect the interests of the companies to whom they are accountable. The inadequacy of a trustee as a device to insulate a corporation from the control of the beneficial holders of its stock was recognized by the Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), where the Court stated that even though the trustee, there the chief executive of the company, "is subject to the ultimate control and supervision of the District Court, there is danger that he may vote the new company stock in a manner calculated to perpetuate the very conditions which led us to order severance of the illegal combination." The instant case is even more disturbing than *Cascade*. Here, the trustees would be financial institutions which would not be in a position to make independent judgments in exercising voting rights. By necessity they would be forced to seek the advice of the beneficial owners before casting their votes. The defendant retailers are neither forbidden to attend stockholders meetings nor to consult with the trustees. Moreover, control over a corporation does not rest alone in the voting of stock; a businessman's wishes as to how his corporation will conduct its business may be made known in myriad ways other than by voting his stock. Thus, *United States v. E. I. du Pont de Nemours*, 366 U.S. at 332, pointed out that the power to sell stock, such as exists under the Blue Chip decree, can be used coercively.

The general injunctive provisions in this decree are not adequate to deal with this threat. This Court in *du Pont*, 366 U.S. at 333-334, said that the public interest should not "be required to depend upon the often cumbersome and time-consuming injunctive remedy."

Second, defendants will be free to continue to use Blue Chip stamps. It seems apparent that, since they will continue to be substantial shareholders of Blue Chip, the possibility is remote that they will transfer their trading stamp patronage to an independent trading stamp company. That the defendants will use no stamp other than Blue Chip is indicated by the fact that with minor exceptions they have used no stamps other than these since the inception of Blue Chip. (See plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 36A and 36B, at pp. 118-119.) As a result of the inevitable use by defendants of Blue Chip stamps rather than any other stamp, Thrifty Shoppers and other competitors in the trading stamp business will be foreclosed from a high percentage of the trading stamp market in California.

Third, a large block of shares—which within several years will amount to approximately ten percent of the total—will be issued to management—some immediately and some under a stock option plan. Thus, the present management, which has faithfully carried out the defendants' wishes by serving as the agency responsible for building up the Blue Chip monopoly, will be richly rewarded for the part which it has played in building up the monopoly and will continue to direct the affairs of the corporation. The likelihood that management will continue to follow patterns established in the past in violation of law was noted by the Supreme Court in *United States v. E. I. du Pont de Nemours*, 366 U.S. at 332.

Fourth, approximately 45 percent of the shares of the new company to be formed will be made available in proportional amounts to the retailers who have used Blue Chip stamps. Since twenty-five firms account for over 50 percent of Blue Chip's sales, the effect will be to place an overwhelming share of ownership of the corporation in a handful of retail chains. Furthermore, the issuance of stock and the company's debentures to retailers who use Blue Chip will effectively tie to Blue Chip the additional thousands upon thousands of retail merchants in California who have been using Blue Chip during the past three years. The Government stated the infirmity in any such arrangement when in its November 28, 1966, memorandum it commented on the decree proposed by the State of California which would have vested control over the company and ownership of its assets in the retail grocers utilizing the Blue Chip service (at p. 30):

> "The State's proposed decree would be unacceptable to the Government because (a) it would transfer complete control and domination of the Blue Chip Stamp Company and the same monopolistic position presently enjoyed by Blue Chip Stamp Company from one group of grocers to an even larger and more potent group of grocer wholesalers and retailers, and (b) it would afford no opportunity for competitive trading stamp companies to come into the California market in a manner comparable to that provided by Section VIII of the proposed decree [lodged October 28, 1966]."

Fifth, the decree grants Blue Chip a period of 30 months after its reorganization within which to submit a *plan* for the sale of one-third of its then existing trading stamp business in California, with no time limit at all established for the subsequent carrying out of that plan and, as noted earlier, there is no certainty that there will be any sale

at all. The business to be divested must be within a contiguous area in *Southern* California. In *Purity Stores, Inc., v. Blue Chip Stamp Co., supra,* the court found that in 1963 Blue Chip had in excess of 75 percent of the trading stamp business in Northern California. None of that business need be divested, and Blue Chip will continue to occupy its monopolistic position in that area of California.

Of transcendent importance is the fact that the time period contemplated for this divestiture is inordinately long. Blue Chip has two and one-half years after reorganization simply to present a plan for divestiture. In estimating the total period of time which will elapse before the divestiture need be completed, it is necessary to add to the 30-month period the time required for the reorganization of Blue Chip, for the approval of the plan and for the divestiture itself. The need for "swift severance of the illegal combination" and for dissipation of the violation "with all convenient speed" which this Court found in *Cascade* is abundantly present here. Throughout the time that divestiture is delayed, Blue Chip will be able to expand its monopolistic position and to eliminate the possibility of any effective competition.

4. The fact that the decree was entered with the consent of the Government should not insulate the judgment from review by this Court. Particularly in antitrust matters, this Court is vested with the responsibility of determining for itself if the relief entered by the lower court, litigated or by consent, is in the public interest. In *E. I. du Pont de Nemours,* 366 U.S. at 324-325, the Court stated:

> "Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his [a single judge's] determination. This circumstance imposes a special burden

upon us, for, as Mr. Justice Roberts said for the Court, '***it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him,' Hartford-Empire Co. v. United States, 1945, 324 U.S. 570, 571, 65 S.Ct. 815, 817, 89 L.Ed. 1198, clarifying 1945, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322.

"These principles alone would require our close examination of the District Court's action." (Emphasis added.)

The necessity of careful review by the Supreme Court is of particular importance in this case because of the extensive role which the district court played in the formulation of the decree and by reason of the fact that the decree as entered contained provisions which the Government had earlier rejected as unacceptable because they would increase the potency of the monopoly.

CONCLUSION

The decree entered by the court is plainly inadequate to remedy the pervasive effects of the defendants' illegal monopolization of the trading stamp business in California. Thrifty Shoppers, which will be substantially affected by the decree, should have been permitted to intervene. The issues present substantial questions of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

DAVID B. GOLD
Counsel for Appellant,
Thrifty Shoppers Scrip Co.

November, 1967.

(Appendices follow)

Appendix A

Filed Aug 18 1967

Clerk, U. S. District Court
Central District of California

In the United States District Court
Central District of California

Civil No. 63-1552-F

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

Independent California Service Station Operators, plaintiffs in the action of Twyman, et al. v. Blue Chip Stamp Company, et al.,
Petitioners for Intervention

Raley's, a corporation,
Petitioner for Intervention

Thrifty Shoppers Scrip Co.,
Petitioner for Intervention

OPINION DENYING MOTIONS TO INTERVENE AND TO VACATE CONSENT DECREE

On June 5, 1967, the Court approved and signed a consent decree in this antitrust action. Subsequent thereto Petitioners for Intervention filed motions which seek—

(a) to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure;

(b) to be permitted to intervene under Rule 24(b); and

(c) to vacate the consent decree of June 5, 1967.

At the conclusion of argument on July 31, 1967, the Court orally announced its decision, and by minute order denied the motions. This opinion is written in order to permit a studied examination of the Court's views.

BACKGROUND

On December 26, 1963, the United States filed its complaint alleging that Blue Chip Stamp Company, Thrifty Drug Stores Co., Inc. (the largest pharmacy chain in California) and eight grocery chains (whose 1962 sales constituted 30 percent of all sales of grocery stores in California) had since 1955 engaged in a conspiracy in restraint of trade, and had monopolized the trading stamp business in California, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint sought an injunction against continuation of the activities charged and asked that the defendant retailers be enjoined in the future from using Blue Chip stamps.

After the case was filed, the Government and the defendants engaged in detailed negotiations to settle the litigation by consent decree. These negotiations extended over two years in time, and the Government afforded an opportunity to all defendants and to all other parties expressing an interest in the case to be heard. As a result of these negotiations, three separate consent decrees were proposed, each of which was lodged with this Court. In order that interested parties might have time to study each proposed decree and

to make known their views with respect to it, there was annexed to each decree a stipulation providing that all signatory parties consented to entry of the given decree after 30 days unless the Government withdrew its consent during the 30-day period.

On July 22, 1966, the first proposed decree was lodged with the consent of all parties except defendants Market Basket and Thriftimart. The two non-consenting defendants as well as the State of California, Certified Grocers Association, and California Grocers Association (all non-parties), raised objections to the decree before the 30-day period had expired. The Government then withdrew its consent and the decree was withdrawn.

Following further negotiations, a second decree was drafted and lodged with the Court on October 28, 1966. The annexed stipulation to the decree was signed by the Government and all defendants except Market Basket and Thriftimart. The Government and the consenting defendants filed briefs in support of the decree. The two non-consenting defendants, and the California Grocers Association, Certified Grocers Association, S & H Stamp Company, and the State of California filed briefs in opposition to entry of the decree. On December 13, 14 and 15, 1966, this Court held hearings, and all parties favoring or opposing the decree were given opportunity to be heard. At the conclusion of the hearings, the Court refused to sign the proposed decree and outlined certain requirements it believed essential to any decree settling the case.

On April 28, 1967, a third decree was lodged, consented to by all defendants. The Court ordered notice should be given to all parties previously appearing in the case, including parties *amici curiae*. Argument was set for June 5, 1967. Such notice was given. Briefs in favor of this third pro-

posed decree were filed by the Government, all defendants, and also by the State of California, the California Grocers Association, and Certified Grocers Association, who had been active in opposing the earlier decrees. Briefs *amici curiae* in opposition to the proposed decree were filed by the petitioners herein, by S & H Stamp Company, and by Gold Bond Stamp Company. After a study of the briefs and consideration of the oral arguments, the Court signed and entered the proposed decree on June 5, 1967.

DESCRIPTION OF PETITIONERS

Independent California Service Station Operators are plaintiffs in the case of *Twyman et al. v. Blue Chip Stamp Company et al.*, Civil No. 66-1522-F, now pending before this Court. The complaint therein alleges substantially the same violations as those alleged in the Government complaint (violation of Sections 1 and 2 of the Sherman Act). Likewise, the Government complaint is incorporated in the petition to intervene. The service station operators suing in *Twyman* and seeking to intervene here claim that by virtue of the Blue Chip trading stamp monopoly, a customer demand has been created for trading stamps, so that service station operators must give trading stamps. It is alleged that by being thus forced to give trading stamps and by being forced to obtain said trading stamps from a monopoly, the service station operators are damaged. Their complaint seeks threefold damages under the provisions of 15 U.S.C. § 15.

Thrifty Shoppers Scrip Co. is a stamp company which competes with Blue Chip. It has filed an action in this Court, *Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Co.*, No. 67-596-F, against the same defendants as are here, alleging injury in its efforts to compete in the trading stamp busi-

ness in California due to the restraints of trade and the monopolization by the defendants. Thrifty seeks threefold damages.

Raley's, Inc., a retail grocery chain, also is the plaintiff in a civil action now pending before this Court. A 2% stockholder of Blue Chip, Raley's is suing on behalf of said company and other stockholders. *Raley's et al. v. Alexander's Markets et al.*, Civil No. 64-660-F. Named as defendants are Blue Chip, the other defendants in the Government suit, and certain individual shareholders of Blue Chip Stamp Company. Raley's complaint alleges violation of Sections 1 and 2 of the Sherman Act, and prays for money damages, for a decree requiring the defendants to sell their stock in Blue Chip Stamp Company, and for an injunction prohibiting the defendant shareholders from participating in future profits of Blue Chip. In 1966 Raley's commenced using Gold Bond stamps. From 1959 to 1966 it had used its own stamps; prior to 1959 it had used Blue Chip.

RULE 24

The applicable Rule is Rule 24, Federal Rules of Civil Procedure:

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

QUESTIONS PRESENTED

The questions presented are (1) whether petitioners have a right to intervene [Rule 24(a)], or (2) should be permitted to intervene [Rule 24(b)] in an action brought by the Government and subsequently settled, with the consent of the Court after a full hearing, and, (3) whether, ancillary to this, the petitioners have a right to have the consent decree vacated.

THE PETITIONS WERE NOT TIMELY

Rules 24(a) and 24(b) specifically provide for intervention only upon "timely application". The present motions were neither served nor filed until after June 5, 1967, the date the consent decree was entered. Twyman's motion was filed June 19, 1967; Thrifty Shoppers' on July 12, 1967; and Raley's on July 14, 1967. The rule for intervening after

entry of a final judgment is set forth in Barron & Holtzoff, Fed. Prac. & Proc., vol. 2, ¶ 594:

> "Intervention may be allowed after a final judgment or decree if it is necessary to preserve some right which cannot otherwise be protected, but such intervention will not be permitted unless a strong showing is made."

Petitioners have failed to make any showing at all as to any right which can only be protected by intervention. Furthermore, there is no showing that their applications are "timely".

Each petitioner claims it demonstrated its opposition to the decree by filing an *amicus curiae* brief and by arguing in opposition to its entry. However, if petitioners had time to make known their opposition to the decree, they had time to file their applications to intervene.

In *United States v. Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Maine 1954), *aff'd*, 221 F.2d 957, *cert. denied*, 350 U.S. 842, the Court stated:

> "Although the determination of timeliness involves a consideration a number of factors and the time element alone is not controlling, a strong showing must be made by the applicants in order to be allowed to intervene after the entry of a final judgment. See 4 Moore's Federal Practice, 2d Ed., Par. 24.13." 17 F.R.D. at 102.

In *Slusarski v. United States Lines Co.*, 28 F.R.D. 388, 390 (E.D. Pa. 1961), the Court stated: "Where, as here, all issues have been resolved and the litigation concluded, with entry of judgment, we think the application is clearly too late." For similar rulings see *Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965), appeal dismissed—*cert.* improvidently granted, 384 U.S. 28; *Kaplan v. Guardian Life Ins. Co. of Amer.*, 231 F.Supp. 874, 876-77 (W.D. Mo. 1964);

Union Nat. Bank of Youngstown, Ohio v. Superior Steel Corp., 9 F.R.D. 124 (W.D. Pa. 1949).

Rule 24 fails to provide any standard by which timeliness may be tested. Thus, it is necessary to look to all the circumstances in a given case. However, the courts do not look with favor upon one who, fully aware of what has transpired, nonetheless fails to act on his rights and is unreasonably tardy in filing a petition for intervention. Thus, it has been stated:

> ". . . we might say we do not see any reason why these interveners could not have sought intervention much earlier. The Court should also consider the state of the cause. That is, as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have in effect slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania. We do not feel that this is a function of a district court." *Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corp.*, 24 F.R.D. 476, 477 (W.D. Pa. 1959).

The requirement of timeliness is not without foundation. The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances. Such circumstances are not present here. Petitioners have for some time been aware of the existence and nature of the negotiations leading to the final decree entered by this Court. They have been

given every opportunity to be heard. Had they felt their interests were not being given adequate consideration, they should have moved to intervene. They chose not to do so, but rather waited until lengthy and complex negotiations had been completed, all arguments of *amici* in opposition to the three proposed decrees had been heard, and a consent judgment entered, before ultimately seeking to intervene.

Petitioners cite *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960), as purported authority for the proposition that intervention is proper after entry of a consent judgment. However, *Kozak* is not applicable here. In that case the motion to intervene came *prior* to entry of the decree and before the issues had been drawn. The opinion did note, however, that "There are even occasions where intervention is proper after judgment." But such cases have typically involved a refusal or unwillingness by the losing party to diligently prosecute the lawsuit, this fact not becoming apparent until after the Court's decision. *E.g.*, *Hurd v. Ill. Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956) (intervention granted at appellate level where in a spurious class action it appeared that certain members of the class doubted the faithfulness of the named plaintiff in prosecuting the appeal on behalf of the class); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953) (intervention granted for purposes of prosecuting appeal by a stockholder who learned after judgment had been entered against the corporation, that the corporation had decided not to appeal, despite the fact that the corporation's suit against its officers to recover allegedly improper profits had been instigated at the request of this stockholder); *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 777 (intervention granted for purposes of prosecuting

appeal because affected property owners did not learn until after judgment that the zoning commission did not intend to appeal an adverse judgment). Under circumstances such as these, where the inadequate representation of the petitioner's interest comes to light only after entry of the decree, the courts have been willing, with good reason, to recognize an exception to the general rule forbidding intervention after entry of the decree. This exception has been narrowly defined: "Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected." *Wolpe v. Poretsky, supra,* 144 F.2d at 508.

Referring again to *Kozak, supra,* the motion to intervene therein, as noted above, was filed before entry of final judgment. Thus, *Kozak* is not authority excusing petitioners here from the necessity of making a "strong showing" as to why they did not proceed more diligently. The delay in serving and filing the motions cannot be overlooked when considered in light of the injury sure to result to the public should implementation of the decree be postponed.

Petitioners contend they meet the requirement of timeliness since the *El Paso* case [*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967)] holds that even after entry of the consent judgment, intervention may be permitted. Whether or not this is in fact the holding in *El Paso,* it is clear that that case does not rewrite Rule 24(a) and (b) to eliminate the requirement of timeliness. After the Supreme Court ordered divestiture, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), the District Court held hearings on the form of relief. Twenty parties, including the State of California and Cascade Natural Gas Corp., filed motions to intervene. These

motions were filed and denied *before* the District Court entered its consent decree. Thus, in the opinion whereby intervention was denied, the District Court stated, "All that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court." *U.S. v. El Paso Natural Gas Co.*, 37 F.R.D. 330, 332 (D. Utah 1965). Of the 20 prospective intervenors, California, and Cascade Natural Gas Corp., appealed to the Supreme Court, along with Southern California Edison Co., which had petitioned to intervene at a later date. The Supreme Court reversed, permitting intervention. The Court's opinion, per Mr. Justice Douglas, does not even discuss timeliness.

As noted above, California, and Cascade Natural Gas Corp. both sought intervention well in advance of entry of the consent decree. It is not clear when the petition of Southern California Edison Co. was filed. However, on these facts, and in view of the fact that the Supreme Court did not discuss timeliness or the dates the petitions were filed, it is clear that *El Paso* cannot be taken as authority for the proposition that intervention may be permitted after entry of a consent decree.

In *El Paso*, the Supreme Court observed that it had a right to protect and to insure obedience to its own previous mandate. Similarly, this Court likewise has broad powers to protect and interpret decrees which it has approved and issued. Obviously, a ruling by a court that intervention is proper to insure compliance with its earlier mandate is no authority for asserting that a court, which has issued a mandate, should permit intervention for the purpose of attacking the mandate. In this respect, *El Paso* is actually authority for the denial of the instant motions to intervene, because the present Court has power to interpret and enforce the mandate which it has issued.

This interpretation of *El Paso, supra,* has been sustained in the most recent session of the Supreme Court. The Government had prevailed in an action brought to force Alcoa to divest itself of Cupples. *(United States v. Aluminum Company of America,* 233 F. Supp. 718, 247 F. Supp. 308 (E.D. Mo. 1962), *affirmed per curiam,* 382 U.S. 12.) During the pendency of the action, and subsequent negotiations for divorcement, Alcoa and Cupples bid on a contract to supply aluminum curtain walls for the proposed New York Port Authority building, under an agreement that if Alcoa were forced to divest itself of Cupples, it would relinquish the contract to Cupples. Lupton Manufacturing Co. also bid to supply aluminum curtain walls for the building. When the order of divorcement became final, Lupton moved to intervene under Rule 24(a) and (b). Lupton did not contend that it had a right to bid free from competition, but rather asserted that if Cupples were permitted to retain the contract it would retain part of the profit of an illegal merger, and thereby frustrate the purposes of the Government's case, namely, to restore free and open competition in the aluminum curtain wall industry. The District Court denied Lupton's motion to intervene and a direct appeal was taken to the Supreme Court. *United States v. Aluminum Company of America and Cupples Products Corp.,* 41 F.R.D. 342 (E.D. Mo. 1967), appeal to Supreme Court dismissed, 87 S. Ct. (Adv.) 2112 (June 12, 1967).

PETITIONERS HAVE NO RIGHT TO INTERVENE UNDER RULE 24(a)

Rule 24(a) governs intervention as of right. In addition to the requirement of "timely application", 24(a) further requires that a prospective intervenor claim—

". . . an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest. . . ."

Petitioners have not demonstrated the existence of any "interest relating to the property or transaction" which is the subject of the Government's suit which might support their applications to intervene.

Each petitioner has filed an action, pending in this Court, charging the defendants with substantially the same antitrust violations as those charged in the Government's case. They seek damages for the injuries suffered as a result of these violations. None of their "interests" are in any way "impaired or impeded" by settlement of the Government's case. Nor is their ability to prosecute their respective cases impaired or impeded by the Government's case. The speculation that petitioners may be benefited in the trial of their respective cases if the Government is forced to litigate its case certainly does not give them an "interest" in the Government's case sufficient to support the motions to intervene.

If the petitioners are appearing merely as members of the public, in the public interest, then it is incumbent upon them to establish that the Government has not acted properly in the public interest. This they have not done. Congress has vested in the Department of Justice the duty of instituting proceedings in equity to prevent and restrain antitrust violations. (15 U.S.C. § 4.) Acting on behalf of the public interest in the present matter, the Government first investigated, and then filed its complaint seeking to restrain the violations and to dissipate the monopoly revealed by its investigation. Substantial effort was

expended both in preparing the case for trial and in seeking to negotiate the consent decree, here challenged, to attain the two principles for which the case was originally filed. The decree enjoins those trade restraints alleged to be illegal in the complaint, and provides for drastically reducing the power of the defendant retailers over Blue Chip Stamp Company; defendant retailers are enjoined from acting in concert in the trading stamp industry in the future. The monopoly power of Blue Chip is decreased, and competition is opened.

PETITIONERS SHOULD NOT BE PERMITTED TO INTERVENE UNDER RULE 24(b)

Generally speaking, the right to intervene to defeat entry of a consent decree in any government antitrust action has been consistently denied.

In *Sutphen Estates, Inc. v. United States,* 342 U.S. 19 (1951), the facts were that after the decision in *United States v. Paramount Pictures, Inc. et al.,* 334 U.S. 131 (1948), Warner Brothers Pictures Corporation was ordered reorganized in a manner similar to divestiture. Sutphen Estates had leased property to a Warner affiliate and Warner had guaranteed the lessee's performance of the lease. Intervention was sought by the lessor to protect its rights against Warner as guarantor. Intervention was denied because the lessor was not a privy of Warner and the "reorganization" decree would not bind the lessor in any legal sense. The Court stated that ". . . the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene". 342 U.S. at 23.

In *Sam Fox Publishing Co. et al. v. United States,* 366 U.S. 683 (1961), the District Court denied certain music

publishers intervention in proceedings for the modification of a prior consent decree in a government antitrust suit. On appeal, the Supreme Court, per Justice Harlan, stated:

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. In *United States v. Borden Co.*, 347 U.S. 514, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in clearest terms that 'private and public actions were designed to be cumulative, not mutually exclusive' *(id.,* at 518). . . ." 366 U.S. at 689.

See also, *United States v. Loew's, Inc. et al.*, 20 F.R.D. 423 (S.D. N.Y. 1957).

In *United States of America v. Radio Corporation of America,* 186 F. Supp. 776 (E.D. Pa. 1960), *appeal dismissed,* 364 U.S. 518, a competitor of the defendant attempted to intervene after a consent decree had been entered, for the purpose of objecting to proposed acquisitions to which the Government did not object. The Court denied intervention, as under the consent decree it had retained jurisdiction only to allow any of the parties to the final judgment—no one else—to apply to the Court for further orders or directions. However, the Court also stated:

> "The Government opposes the motion for intervention and has informed the Court that it has carefully investigated and reviewed all the facts and reached the conclusion that the proposed Boston and San Fran-

cisco acquisitions do not violate the decree. In this state of facts, even if I had discretion to allow the intervention, I would not do so. The Government is concerned with the public interest and is satisfied that the conduct which Westinghouse complains of is not against that interest. It would not lead to an orderly administration of justice to allow intervention in this type of antitrust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained. The movant, if it is aggrieved, must be left to such private remedy as Congress may have provided for it." 186 F. Supp. at 776-777.

This language is particularly significant for the case at bar, where the Government opposes intervention and where the proposed intervenors have already commenced pursuit of private remedies.

PETITIONERS' MOTIONS ARE WITHOUT MERIT

There is no merit to the claims petitioners seek to advance; intervention should thus be denied. In *Marx v. Maddrey,* 106 F. Supp. 535 (E.D. N.C. 1952), petitioner moved to intervene and to set aside an order previously entered. The Court denied intervention on the ground that the arguments raised in opposition to the order were without merit.

Petitioners here do nothing more than reiterate arguments previously presented; they fail to raise any additional arguments not already heard at length and denied by this Court. To permit intervention and vacation of the decree so that these very same arguments can be heard again would impose an unwarranted burden on the parties and the Court.

In support of their contention that their claims should be heard, petitioners cite *United States v. Grinnell*, 384 U.S. 563 (1966), for the proposition that complete destruction of the monopoly power is the standard of relief in monopolization cases. However, the reliance on *Grinnell* is misplaced. Unlike the case at bar, *Grinnell* was litigated to judgment; there was no consent decree. The authorities do not require complete divestiture where a consent decree, rather than a litigated judgment, is entered. The decree herein is designed to limit the powers of Blue Chip and to open up and increase competition in the stamp industry in California, while at the same time preserving the legitimate interests of the users of Blue Chip stamps. This is consistent with the principles embodied in the antitrust laws.

The consent judgment is indispensable to antitrust enforcement. The Government notes that seventy percent of their antitrust judgments are consent decrees. Such decrees result from negotiation, thus typically may provide something less than the full relief prayed for (and often something more than that which the Government could obtain after trial). Litigation that might proceed for many years is avoided by utilization of this procedure. Its legality is beyond question. In *Sam Fox Publishing Co., supra,* the Supreme Court observed that:

> "Apart from anything else, strong policy would strongly lead us to decline appellant's invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." 366 U.S. at 689.

As petitioners have not furnished the Court with anything beyond that which has already been carefully considered and rejected upon ordering entry of the consent decree, there is nothing to be gained and much to be lost by vacating the decree.

Petitioners, when asked by the Court to present in substance a decree which would better serve the public were unable to do so. Their arguments are general and without economic substance. This Court has determined that it is essential that there be a viable non-franchised stamp company which can compete with the strong franchised ones, in order to permit small retail businesses in California to compete with large chain establishments. At the present time there is only one non-franchised stamp company in California, Blue Chip. The decree, among other matters, provides that one-half of Blue Chip's Southern California business must be sold to a purchaser who will operate on a nonfranchised basis. This is the most practical way to increase competition in the retail trading stamp business that has been advanced in 3½ years, and petitioners' arguments against the decree are so shallow as to be devoid of merit.

Dated this 18th day of August, 1967.

/s/ WARREN J. FERGUSON
Warren J. Ferguson
United States District Judge

Appendix B

Filed Aug 3 1967
Clerk, U.S. District Court
Central District of California

United States District Court
Central District of California

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

Civil No. 63-1552-F

ORDER DENYING MOTIONS

Whereas, on October 28, 1966 the Government and all but two defendants lodged a proposed decree settling the above action as to said parties and the proposed decree was set for argument December 13, 1966; and

Whereas, said hearing received wide publicity and numerous parties filed briefs *amici curiae* opposing the proposed decree or made appearances at the argument and argued in opposition to said decree; and

Whereas, on December 13, 14 and 15, 1966 argument by all parties and by numerous *amici curiae* was heard by the Court, which thereon determined not to enter the proposed decree and outlined certain principles to be considered in any decree settling the case; and

Whereas, on April 28, 1967 a proposed consent decree was lodged settling the case as to all parties and the matter was set down for argument June 5, 1967, with notice being given all persons shown by the record as having appeared as *amici curiae* in said case; and

Whereas, numerous persons filed briefs *amici curiae* in opposition to said proposed consent decree, including Thrifty Shoppers Scrip Co. and Independent California Service Station Operators; and

Whereas, on June 5, 1967 numerous persons appeared in opposition and made oral argument in opposition to said proposed decree, including the two persons just named and Raley's, Inc., who at that time presented both written and oral argument, following which said proposed final judgment was duly signed and entered; and

Whereas, the persons listed below served the motions indicated relative to said judgment:

(i) On June 15, 1967 the Independent California Service Station Operators served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure and a motion to vacate said judgment;

(ii) On July 14, 1967 the Independent California Service Station Operators served a motion under Rule 15(a) of the Federal Rules of Civil Procedure to substitute an amended complaint in intervention for the complaint in intervention previously served and filed by it;

(iii) On July 7, 1967 Thrifty Shoppers Scrip Co. served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure and a motion to vacate said judgment; and

(iv) On July 14, 1967 Raley's Inc. served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure; and

Whereas, notice having been duly given, memoranda of authorities having been submitted by said movants in favor of their motions and by all parties to said judgment in opposition to said motions, and the matter having come on to be heard on July 31, 1967 and oral argument being heard and considered;

It Is Hereby Ordered that all said motions be denied for the following reasons among others:

Said motions were not made upon timely application;

No sufficient interest in the subject matter of said judgment has been established by any of said movants;

All interests of each of said movants are included within these public interests which have been considered and safeguarded by the action of the Government herein;

Each movant has failed to establish any valid reason why said judgment should be altered; and

To grant any said motion would unduly delay and prejudice the rights of the parties hereto.

Dated: August 3, 1967.

WARREN J. FERGUSON
United States District Judge

Approved as to form:
O'Melveny & Myers
By WILLIAM W. AILSUP
Attorneys for Blue Chip Stamp Company;
Alexander's Markets; Lucks Stores, Inc.;
Market Basket; Purity Stores, Inc.;
Ralphs Grocery Company; Safeway Stores,
Incorporated; Thriftimart, Inc.;
Thrifty Drug Stores Co., Inc.; and
Von's Grocery Co.

Appendix C

Lodged—Apr 28 1967
Clerk, U. S. District Court
Central District of California

Filed Jun 5, 1967
Clerk, U. S. District Court
Central District of California

United States District Court
Central District of California

Civil No. 68-1552-F

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint in the United States District Court for the Southern District of California, Central Division, on December 26, 1963; each of the defendants having appeared and filed its answer denying the substantive allegations thereof; and the plaintiff and the defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue

of fact or law herein, without the taking of any evidence, and without this Final Judgment constituting any evidence or admission by any party in respect to any issue of fact or law herein;

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties consenting hereto. The complaint states claims for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act.

II.

For the purposes of this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, association, corporation or other legal or business entity;

(B) "Trading stamp business" shall mean the distribution for compensation, of trading stamps to any person for issuance to its customers, employees or others, and the redemption of said stamps for merchandise or money;

(C) "Trading stamp company" shall mean a person engaged in the trading stamp business;

(D) "Capital Assets" shall mean land, buildings, leasehold improvements, furniture and fixtures, warehouse equipment, delivery equipment and automobiles.

(E) "Southern California" is that part of California south of the line formed by the northern boundaries of San Luis Obispo, Kern and San Bernardino Counties.

(F) "New Blue Chip" shall mean a purchaser of, or any other successor to, Blue Chip's trading stamp business pursuant to Section VI herein or a reorganized company pursuant to Sections V or VII herein.

(G) "Reorganization" shall mean a reconstitution of the stock structure of Blue Chip and shall include the creation of a new company to which the assets and liabilities of Blue Chip are transferred, or into which Blue Chip is consolidated or merged.

III.

The provisions of this Final Judgment applicable to any defendant and any person agreeing to be bound shall also apply to each of its subsidiaries, successors, assigns, officers, directors, and employees, and to all other persons in active concert or participation with such defendant or persons who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between or among such defendant or person and its officers, directors, employees, parent company, subsidiaries and affiliates, or any of them.

IV.

Each of the retailer defendants is enjoined and restrained from:

(A) Combining or conspiring to restrain trade in, or monopolizing or attempting to monopolize the trading stamp business in the State of California; or carrying out, directly or indirectly, any such combination, conspiracy, attempt to monopolize or monopolization;

(B) Entering into any contract, agreement or understanding with any other user of trading stamps in the same line of business:

(i) To refrain, in the State of California or in particular areas thereof, from using trading stamp services entirely or from using the trading stamp services of any particular person or persons; or

(ii) To limit the rate of issue employed in distributing trading stamps to their respective customers in such state;

(C) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company to operate in the State of California except as provided in Sections V, VI or VII hereof.

Provided, that this Section IV shall not apply to a retailer defendant, acting independently: (i) in obtaining or entering into any contract to obtain trading stamp services from any trading stamp company; or (ii) when such defendant is engaged in the trading stamp business (either directly or through a subsidiary or affiliate), in furnishing or entering into any contract to furnish trading stamp services to any person, and provided further that this Section IV shall not apply to the provision of trading stamp services by any trading stamp company which is not named as a defendant herein.

V.

Blue Chip is ordered and directed to present to the Court, within 60 days following the date of entry of this Final Judgment, a plan for the reorganization of Blue Chip Stamp Company. The plan shall be substantially in accordance with either of the plans heretofore furnished

to plaintiff. Upon approval of the plan by the Court, Blue Chip shall make bona fide and diligent efforts to reorganize the company pursuant to the said plan. If at any time, in plaintiff's judgment, such efforts are not being made, plaintiff may apply to the Court for an order directing that this Section V shall no longer apply. In the event that such order issues, Blue Chip shall be required to divest pursuant to Section VI or to reorganize pursuant to Section VII hereof.

VI.

(A) In the event that Section V becomes inapplicable Blue Chip is ordered and directed to divest, with all due diligence, within 15 months from the date upon which Section V shall no longer apply, all of the company's capital assets, goodwill, and the right to the service mark and to the use of the name "Blue Chip," and, following such divestiture, to discontinue issuance of trading stamps, cease doing business as an operating company and thereafter to wind up its affairs and dissolve consistent with the applicable laws of the State of California. The divestiture shall be made upon the following terms and conditions:

(1) The purchaser or successor to Blue Chip's trading stamp business shall agree to enter its appearance in this proceeding and shall furnish its written consent to be bound by the applicable provisions of this Final Judgment.

(2) The purchaser or successor shall agree to engage in the trading stamp business in California for a reasonable period of time.

(3) The purchaser or successor shall contract with Blue Chip on mutually satisfactory terms for the redemption of all outstanding trading stamps thereto-

fore issued by Blue Chip and said contract shall insure discharge of Blue Chip's redemption obligations and shall require the purchaser or successor to redeem its stamps interchangeably with the trading stamps theretofore issued by Blue Chip.

(4) The purchaser or successor shall assume such other obligations as Blue Chip and it may agree and Blue Chip shall transfer such cash, securities or other assets as it and Blue Chip may agree.

The said divestiture may be made by a sale of assets, a sale of stock of a corporation which controls the assets, or in any other manner not otherwise inconsistent with the terms of this decree. Provided, that in the event that all of the stockholders of Blue Chip dispose of their stock to a purchaser or successor said disposal shall be regarded as a divestiture by Blue Chip for the purposes of this Final Judgment.

(B) Blue Chip shall make known the availability of the assets for sale. Blue Chip shall furnish to bona fide prospective purchasers making inquiry to it, such information as is reasonably necessary for them to proceed with negotiations looking toward the ultimate acquisition of the assets to be divested and shall furnish plaintiff concurrently with the name of any such prospective purchaser. Blue Chip shall render quarterly reports to the Assistant Attorney General in charge of the Antitrust Division concerning its efforts to effectuate the divestiture required, the first such report to be rendered within 30 days of the date that Section V shall no longer apply.

(C) At least 30 days in advance of the closing date specified in any contract for sale, Blue Chip shall supply plaintiff with the name of the proposed purchaser, the purchase contract, and with such other information in its

possession as is material to the proposed sale. If plaintiff requests, the said closing date shall be extended to the extent necessary to afford plaintiff 60 days between the date of the receipt of the said information and the closing date. Blue Chip may close any sale unless plaintiff serves upon Blue Chip, at least 15 days in advance of the closing date, written notice that plaintiff objects thereto. If plaintiff serves such written notice with respect to a sale to a purchaser engaged in the trading stamp business, or a purchaser engaged in the operation of retail food stores in the State of California, such sale shall not be closed. If plaintiff serves such written notice with respect to any other sale, the sale shall not be closed unless approved by the Court. The time period set forth in Section VI(A) above shall be tolled during the pendency of any extension or of any proceeding under this Section VI(C).

(D) The divestiture ordered and directed by Section VI(A) of this Final Judgement shall be made in good faith and shall be absolute and unqualified except as follows:

(1) Nothing herein contained shall be deemed to prohibit Blue Chip from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust or any other form of security reasonably necessary to secure full payment of the price at which the divested property is disposed of or sold or to secure any other obligation of a purchaser or successor, provided that if Blue Chip shall regain ownership of or control over the property divested as a result of any lien, mortgage, deed of trust, or other undertaking Blue Chip shall be required to terminate such ownership or control within 18 months thereafter.

(2) In the event that Blue Chip receives, as a result of any divestiture hereunder, stock of a corporation which controls the divested assets:

(a) Blue Chip shall be required: (i) to dispose of any amount of such stock in excess of 10% of the outstanding common stock of such corporation within one year following the date of receipt thereof or within 22 month following the date Section V shall no longer apply, whichever is earlier, provided that in no event shall such disposal be required within less than three months following the date of receipt of such excess; and (ii) to dispose of the balance of such stock no later than the date of final distribution in liquidation; and (iii) pending disposal, to cause any voting rights of such stock to be exercised by a financial institution or other third party who is acceptable to plaintiff or approved by the Court; and

(b) In the event Blue Chip distributes such stock to its shareholders, no distribution shall be made pursuant to which any Blue Chip shareholder will retain more than 1% of the outstanding common stock of the said corporation unless the plan of distribution is acceptable to plaintiff or approved by the Court.

VII.

In the event that Section V becomes inapplicable, Blue Chip may also enter into a reorganization pursuant to a plan for the reorganization of Blue Chip Stamp Company acceptable to the Court. The plan shall be substantially in accordance with either of the plans heretofore furnished to plaintiff or in accordance with any other plan acceptable to Blue Chip and to plaintiff.

VIII.

(A) Blue Chip is ordered and directed to continue its trading stamp business and to continue to promote its trad-

ing stamp service until completion of the reorganization set forth in Sections V or VII above or until the divestiture set forth in Section VI above. Until such reorganization or divestiture Blue Chip is enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using Blue Chip's stamp service; (ii) the rate of issue employed by such person in offering Blue Chip's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person: (i) to limit the rate of issue employed in offering Blue Chip's or any other person's stamps; or (ii) to refrain from using any other trading stamp service.

(B) New Blue Chip, in the event that it is not already a party hereto, shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. A purchaser of assets pursuant to Section IX hereof shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. New Blue Chip and such purchaser are enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using the company's stamp service; (ii) the rate of issue employed by such person in offering the company's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person (i) to limit the rate of issue employed in offering the company's

or any other person's stamps; or (ii) to refrain from using any other trading stamp service;

(3) Having as an officer or employee any person who, while holding such position, also serves as an officer, director, or employee of any person using trading stamp services; or from having, for a period of ten years following the date of entry of this Final Judgment, as a director, any person who, while holding such position, also serves as an officer, director or employee of any person who was a Blue Chip stockholder in 1956 or 1957.

(C) Each of the retailer defendants is enjoined and restrained for a period of ten years following the date of entry of this Final Judgment:

(1) From having as an officer, director, or employee any person who, while holding such position, also serves as an officer, director or employee of New Blue Chip; or

(2) From exercising any right which it might acquire to vote for the election of any official of New Blue Chip; *provided* that a retailer defendant may cause such right to be exercised independently by a financial institution or other third party acceptable to plaintiff or approved by the Court.

Each retailer defendant shall be free to utilize or not utilize the trading stamp services of Blue Chip and New Blue Chip and, except as provided in this Section VIII(C), to exercise the same rights and privileges available to every other user of the stamp services of Blue Chip or New Blue Chip.

IX.

New Blue Chip shall, within 30 months after the date of completion of the reorganization under Sections V or VII above or the divestiture under Section VI above present

for the approval of the Court a plan which shall include the following terms:

(1) New Blue Chip shall offer for sale one-third of its then existing trading stamp business in the State of California. The business to be offered for sale shall be located within a contiguous geographic area within Southern California.

(2) A purchaser shall be permitted to acquire the business only upon the condition that it enter its appearance in this proceeding and agree: (i) to be bound by the applicable provisions of Sections VIII(B), IX, X and XI of this Final Judgment, and (ii) to engage in the trading stamp business for a reasonable period of time. A purchaser shall have the right, if it so elects, to redeem New Blue Chip trading stamps within the contiguous area for the period of one year following the consummation of the sale. Plaintiff shall have the right to object to a purchaser in the same manner as it may object to a purchaser under Section VI(C) above.

(3) New Blue Chip shall not, during the period of one year following the consummation of the sale: (i) knowingly allow any person operating retail establishments in the contiguous area to issue New Blue Chip stamps to customers of such establishments; or (ii) furnish New Blue Chip stamps to any person with knowledge that the stamps will be issued to customers at any retail establishment in the contiguous area; or (iii) otherwise engage in the trading stamp business in the contiguous area except that, if the purchaser does not elect to redeem New Blue Chip stamps or if the purchaser fails to perform in accordance with his redemption obligations, New Blue Chip shall have the right to redeem its outstanding stamps in said area.

Following the said one year period, New Blue Chip shall offer its trading stamp service in the contiguous area.

X.

For the purpose of securing compliance with this Judgment and for no other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, New Blue Chip, or any purchaser under Section IX hereof, made to its principal office, and subject to any legally recognized privilege, be permitted:

(1) Access during the office hours to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of any person specified in this Section X(A) related to any matters contained in this Judgment;

(2) Subject to the reasonable convenience of, and without restraint or interference from, any person specified in this Section X(A), to interview officers or employees of any such person who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, any defendant, New Blue Chip or a purchaser under Section IX shall submit such additional reports in writing with respect to the matters contained in this Final Judgment as may be requested. Provided that no information obtained by the means provided for in this Section X shall

be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for construction, carrying out, modification, termination or enforcement of or compliance with the provisions of this Final Judgment and for the punishment of violations thereof.

Dated: June 5, 1967

/s/ WARREN J. FERGUSON
United States District Judge

Lodged—Apr 28 1967
Clerk, U. S. District Court
Central District of California

United States District Court
Central District of California

Civil No. 63-1552-F

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

COPY OF OUTLINES OF ALTERNATIVE REORGANIZATION PLANS AND COPY OF LETTERS WITH RESPECT THERETO TO BE LODGED WITH PROPOSED FINAL JUDGMENT

In the negotiations between plaintiff and defendants for a consent decree, alternative plans for a possible reorganization of Blue Chip Stamp Company were discussed and, as noted in Section V of the proposed Final Judgment lodged this date, outlines of such plans were furnished to plaintiff. Copies of such outlines are attached hereto with numbers and dollar amounts of the proposed shares of stock and debentures left blank for the reasons stated in the attached letter to the Director of Operations, Antitrust Division, Department of Justice.

Also attached is a copy of a letter dated April 19, 1967 from the attorney for Blue Chip Stamp Company to the Director of Operations, Antitrust Division, Department of Justice, with respect to operations of the company reorganized or organized pursuant to either of said plans "A" or "B".

Dated: April 28, 1967.

For the Plaintiff:

Donald F. Turner
Assistant Attorney General

Gordon B. Spivack
Stanley E. Disney

Lawrence W. Somerville
Attorneys, Department of Justice

For the Defendants:

O'Melveny & Myers
William W. Alsup
Allyn O. Kreps
and
Wilmer, Cutler & Pickering
Arnold M. Lerman

By William W. Alsup
By Arnold M. Lerman
Attorneys for Defendant Blue Chip Stamp Company

O'Melveny & Myers
William W. Alsup
Allyn O. Kreps

By William W. Alsup
Attorneys for Defendants Von's

Gorcery Co., Alexander's Markets, Ralphs Grocery Company, and Thrifty Drug Stores Co. Inc.
DONAHUE, RICHARDS & GALLAGHER
JOSEPH A. WOODS, JR.
and
O'MELVENY & MYERS
WILLIAM W. ALSUP
ALLYN O. KREPS

By Joseph A. Woods, Jr.
Attorneys for Defendant Lucky Stores, Inc.

PILLSBURY, MADISON & SUTRO
WILLIAM E. MUSSMAN
DAVID T. STEFFEN
and
O'MELVENY & MYERS
WILLIAM W. ALSUP
ALLYN O. KREPS

By David T. Steffen
Attorneys for Defendant Safeway Stores, Incorporated

THELEN, MARRIN, JOHNSON & BRIDGES
GORDON JOHNSON
CHESTER H. BRANDON

By Chester H. Brandon
Attorneys for Defendant Purity Stores, Inc.

McCutchen, Black, Verleger & Shea
G. Richard Doty

By G. Richard Doty
Attorneys for Defendant Market Basket

Tinning & DeLap
James E. Cox
and
William J. Currer, Jr.

By James E. Cox
Attorneys for Defendant Thriftimart, Inc.

REORGANIZATION PLAN "A" FOR BLUE CHIP STAMP COMPANY

1. Amend by-laws, if necessary, to eliminate any restriction on transferability of shares.

2. Amend Articles of Incorporation to change authorized capital to number of common shares, $1.00 par value, necessary to effect the reorganization described below.

3. Subject to Permit of Commissioner of Corporations of State of California and to a Registration Statement becoming effective under the Securities Act of 1933:

(a) Reclassify present outstanding Class A and Class B shares into ..... common shares.

(b) Offer to sell, in units of one common share and one $..... ten-year debenture (hereinafter described), an aggregate of ..... units as follows:

(i) ..... units to users since March 1, 1964, of Blue Chip Stamp Company's trading stamp services (other than holders of Class A or Class B shares) at a price of $..... per unit, the right of users to subscribe to be substantially in proportion to annual stamp pad patronage; provided that all such users would have the right to undersubscribe or oversubscribe, subject to allocation in the event of oversubscription.

(ii) ..... units to the public through a firm underwriting at not less than $..... per unit plus underwriting commission. In addition, the underwriter will undertake to underwrite the sale of all units not purchased in the offering under paragraph 3(b)(i).

(c) Offer to sell to the management of Blue Chip Stamp Company ..... common shares at $1.00 per share and reserve for future issuance, to manage-

ment of Blue Chip Stamp Company ..... common shares under a stock option plan at a price related to market value so that the available management shares will total ..... shares.

Thus the percentages of stock eventually will be 45% to present shareholders, 45% to users and the public, 10% to management.

4. The $..... debentures shall:

(a) Be subordinated to claims or causes of action, including, without limitation, claims under the antitrust laws, against Blue Chip and its past and present officers, directors and stockholders relating to Blue Chip operations prior to the date the consent judgment becomes final and not subject to appeal, or arising from the reorganization.

(b) Bear interest at 6% (or at ½% above prime rate, whichever is higher) payable quarterly.

(c) Subject to 4(a) above, be payable ten years after date of issuance, be subject to prepayment in whole or in part six years after date of issuance, and, commencing six years after date of issuance, be subject to the annual retirement of one-fifth of the total amount of the debentures by purchase or redemption through the operation of a sinking fund.

5. For a period of ten years, none of the retailer defendants shall be eligible, directly or indirectly, to acquire any additional common shares.

6. Upon completion of the reorganization and the exchange of shares contemplated under paragraph 3(a):

(a) Each of the retailer defendants receiving any of the ..... common shares to be issued in said exchange shall deposit for a ten-year period the cer-

tificates representing such shares in separate trusts with full voting power vested in separate trustees satisfactory to plaintiff or the Court. Each owner of such common shares shall have the right to sell or otherwise dispose of and transfer any or all of the shares deposited by it in trust and in the event of such sale or disposition the certificates representing the shares sold shall be released from the trust with full voting rights vested in the new owner of such shares, provided such release from the trust shall not occur if the sale or disposition is to an officer, director or a shareholder holding more than 5% of the outstanding stock of any retailer defendant.

(b) The directors of Blue Chip Stamp Company, other than Donald A. Koeppel, shall resign as such directors and shall be replaced by Messrs.

....., ...,
....., ...,
....., ...,
....., ...,
and .....

7. Purchasers of the units under paragraph 3(b) shall be free to transfer either debentures or common shares, independent of the transfer of the other.

8. There shall be no requirement that a user of the trading stamp services of Blue Chip Stamp Company be a stockholder, or that a stockholder be a user.

9. There shall be appropriate provisions to prevent dissipation of, and to maintain liquidity of, present and future assets.

10. The reorganized company shall be obligated to engage in the trading stamp business in California for a reasonable period of time.

REORGANIZATION PLAN "B" FOR BLUE CHIP STAMP COMPANY

1. A new California corporation will be organized with a capital structure of one class of common stock sufficient to accomplish the distribution of the amount of stock contemplated in Reorganization Plan "A". A nominal number of shares will be initially issued to present Blue Chip Stamp Company for cash.

2. Present Blue Chip will be merged into the new corporation in accordance with California law and pursuant to an agreement of merger which will provide that:

(a) The name of the new corporation as the surviving corporation of the merger will be Blue Chip Stamp Company or another name using "Blue Chip."

(b) Subject to Permit of the Commissioner of Corporations of the State of California and to a Registration Statement for the new corporation becoming effective under the Securities Act of 1933, the new corporation will issue its stock and debentures to present Blue Chip stockholders,* non-stockholder users and the public, and to management in the amounts contemplated in Reorganization Plan "A".

(c) The debentures to be issued shall be issued in accordance with the description in paragraph 4 of Reorganization Plan "A".

(d) The new corporation will, expressly and by operation of law under the California statutes gov-

*Present stockholders of Blue Chip under California law will have a right to dissent from the merger and to receive the fair market value of their stock in lieu of stock of the new corporation. To the extent, if any, that this election is exercised, it would reduce the number of shares of the new company to be issued to present Blue Chip shareholders.

erning statutory mergers, acquire all the assets and, in consideration for such transfer of assets, assume all liabilities of the present company arising out of its operations prior to the date the Consent Judgment becomes final and not subject to appeal, including, without limitation, those existing by virtue of anti-trust claims asserted against the present company, its past and present officers, directors and stockholders, and liabilities of the present company, its officers, directors and stockholders arising from the reorganization.

(e) The rights, restrictions and provisions set forth in paragraphs 5 through 10 of Reorganization Plan "A" shall be applicable to the new corporation.

Law Offices of

O'MELVENY & MYERS [Letterhead]

433 South Spring Street — Los Angeles, California 90013
Telephone 620-1120 — Cable Address "MOMS"

April 19, 1967

Re: *United States v. Blue Chip Stamp Company*

Dear Mr. Spivack:

You asked that we confirm the statement to you that it is contemplated that the Blue Chip Stamp Company reorganized or organized pursuant to Plan "A" or "B" will operate for profit for the benefit of its stockholders and not as a cooperative. This is to confirm that statement and to advise you that the registration statement pursuant to which the stock and debentures of the reorganized or newly organized corporation will be issued will explicitly

state it is not intended that profits of the corporation will be rebated to users.

Very truly yours,

William W. Alsup

Gordon B. Spivack, Esq.
Director of Field Operations
Antitrust Division
Department of Justice
Washington, D. C.

Law Offices of

O'MELVENY & MYERS [Letterhead]

433 South Spring Street — Los Angeles, California 90013
Telephone 620-1120 — Cable Address "MOMS"

April 27th, 1967

Gordon B. Spivack, Esq.
Director of Field Operations
Antitrust Division
Department of Justice
Washington, D. C. 20530

Re *United States v. Blue Chip Stamp Company, et al.*

Dear Mr. Spivack:

In our negotiations with you and your staff for a consent decree in the above matter we submitted alternative outlines of plans of reorganization "A" and "B" which had been approved by defendants, the Assistant Attorney General of California and the attorney for Certified Grocers and California Grocers Association.

We do not desire to file as a public document copies of said plans "A" or "B" which specify numbers, dollar amounts or price of the stock and debentures as this

might cause problems for the Company with the California Corporations Commissioner and the Securities and Exchange Commission. Moreover, it is possible that the numbers of shares of the common stock will be increased and the face amount of the debentures will be reduced so as to achieve a wider subscription and to increase the likelihood of alienability of the securities. For these reasons you have agreed with us that the copies of plans "A" and "B" to be lodged with the Court shall not disclose numbers or dollar amounts.

This letter is to assure you that no change will be made in the numbers of or face amounts of the securities which would have the effect of increasing the cost of the common stock to be issued, or of reducing the number of shares thereof to be issued, or of increasing the face amount of the debentures.

It is understood, of course, that in response to questions, requests or otherwise you may feel called upon to, and you are entirely free in your discretion to, disclose the numbers and dollar amounts which are set forth in plans "A" and "B" heretofore submitted to you.

Sincerely yours,

/s/ WILLIAM W. ALSUP

William W. Alsup

WWA:MPE

Appendix D

Sections 1, 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 2, 4, provide in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> * * * * * * *
>
> SEC. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; * * *.

Appendix E

Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. App. following § 2718, provides as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

Appendix F

Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29, provides as follows:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

LIBRARY
SUPREME COURT, U. S.

No. 849

FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM—1967

WILLIAM TWYMAN, dba BILL'S UNION STATION, et al.,
Appellants and Petitioners for Intervention,

vs.

UNITED STATES OF AMERICA; BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKET; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPH'S GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,
Appellees.

On Appeal from the United States District Court for the Central District of California

Jurisdictional Statement

HOWARD, PRIM, SMITH, RICE & DOWNS
HOWARD M. DOWNS
STUART R. POLLAK
A. JAMES ROBERTSON, II
650 California Street
San Francisco, California 94108

Attorneys for Appellants and Petitioners for Intervention

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement	4
Introduction	4
Established Facts Concerning the Blue Chip Monopoly	5
The Government's Complaint	8
Rejection of the Decree of October 28	8
Submission and Entry of Next Consent Decree as Final Judgment on June 5, 1967	11
Procedural Steps Taken to Challenge the Consent Decree Subsequent to Its Entry and to Perfect This Appeal	11
The Questions Are Substantial	12
I. Standards for the Acceptance or Rejection of Proposed Antitrust Consent Decrees Should Be Established by This Court	12
II. Acting Under the Erroneous Assumption That the Standards of Relief for Monopolization Cases Articulated in United States v. Grinnell, 384 U.S. 563 (1966) Were Not Applicable to Antitrust Consent Decrees, the District Court Rejected an Effective Antitrust Consent Decree and Thereafter Entered a Decree Which Will Not Dissipate Blue Chip's Illegally Acquired Monopoly	16
III. Appellants' Motion to Intervene Was Timely	25
Conclusion	28

Page

Appendices

Appendix A—Opinion of the District Court.....App. 1

Appendix B—Order of the District Court Denying Motions .....App. 19

Appendix C—Approved Consent Decree of June 5, 1967, and Accompanying Plans of Reorganization..App. 23

Appendix D—Rejected Consent Decree of October 28, 1966 App. 47

Appendix E—Statutes Involved .....App. 62

TABLE OF AUTHORITIES CITED

Cases	Pages
Adelman v. Paramount Pictures, Inc., 182 F. Supp. 217 (S.D. Tex. 1960)	18
Allen Calculators, Inc. v. National Cash Register Co., 332 U.S. 173 (1944)	27
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967)	3, 11, 25, 27
Kiefer Stewart v. Seagrams, 340 U.S. 211 (1951)	20
MacArthur Liquors, Inc. v. Palisades Citizens Ass'n., Inc., 265 F.2d 372 (D.C. Cir. 1959)	18
Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941)	28
Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954)	20
Olympic Ref. Co. v. Carter, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964)	28
Purity Stores, Inc. v. Blue Chip Stamp Co., 1963 Trade Cas. 78,589 (N.D. Cal.)	7, 19
Sam Fox Publishing Co., et al. v. United States, 366 U.S. 683 (1961)	14, 27
Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951)	27
United States v. Aluminum Company of America, 148 F.2d 416 (2nd Cir. 1945)	19
United States v. American Soc'y of Composers, Authors & Publishers, 11 F.R.D. 511 (S.D.N.Y. 1951)	28
United States v. Bearing Distributors Co., 18 F.R.D. 228 (W.D. Mo. 1955)	28
United States v. California Co-op. Canneries, 279 U.S. 553 (1929) (dictum)	3, 28
United States v. Crescent Amusement Co., 323 U.S. 173 (1944)	19, 20
United States v. E. I. du Pont de Nemours & Co., et al., 366 U.S. 316 (1961)	20, 21, 22

Pages

United States v. General Elec. Co., 95 F. Supp. 165 (D.N.J. 1950) 28
United States v. Grinnell, 384 U.S. 563 (1966) 4, 12, 13, 16, 17, 18, 28
United States v. International Business Mach. Corp., 1956 Trade Cas. 71,117 (S.D.N.Y.) 12, 15
United States v. Loew's Inc., 136 F. Supp. 13 (S.D.N.Y. 1955) 27, 28
United States v. Loew's Inc., 20 F.R.D. 423 (S.D.N.Y. 1957 27
United States v. Pan Am World Airways, Inc., 1959 Trade Cas. 75,138 14
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 27
United States v. Radio Corp. of Ameriea, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed, 364 U.S. 518 (1960) 27
United States v. Swift & Company, 286 U.S. 106 (1932) 14, 15, 16, 17, 28
United States v. Terminal R.R. Ass'n., 236 U.S. 194 (1915) 28
United States v. Vehicular Parking, Ltd., 7 F.R.D. 336 (D. Del. 1947) 28
United States v. Ward Baking, 376 U.S. 327 (1964) 14
United States v. Western Electric Co., 1956 Trade Cas. 71,134 (D.N.J.) 15

STATUTES

Section 2 of the Expediting Act of February 11, 1903, 15 U.S.C. 29 ..... 3, 4, 18
Federal Rule of Civil Procedure, Rule 24 ..... 4, 25
Federal Rule of Civil Procedure, Rule 59e 4, 27
Sherman Act, Sections 1 & 2, 15 U.S.C. 1 & 2 ..... 3, 4, 5, 8, 19
Sherman Act, Section 4, 15 U.S.C. 4 ..... 2, 4

OTHER

Beem, *Who Profits from Trading Stamps,* Harvard Business Review, Nov.-Dec. (1957) 21

Pages

Consent Decree Program of the Department of Justice, Report of the Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 86 Cong., January 30, 1959, p. IX 13, 14

Consent Decree Program of the Department of Justice, Report of the Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 85 Cong., Serial Number 9 pp. 431-432 14

Fulop, *The Role of Trading Stamps in Retail Competition*, 31, (1964) 23

M. Goldberg, "The Consent Decree: Its Formulation and Use" 20 (Michigan State University Bureau of Business Economic Research Occasional Paper No. 8, 1962) 14, 15

Phillips, *Antitrust Consent Decrees*, 18 Wash. & Lee L. Rev. 39, 46-50 (1961) 13

In the Supreme Court of the United States

OCTOBER TERM—1967

No. .....

WILLIAM TWYMAN, dba BILL'S UNION STATION, et al.,
Appellants and Petitioners for Intervention,

vs.

UNITED STATES OF AMERICA; BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKET; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPH'S GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,
Appellees.

On Appeal from the United States District Court for the Central District of California

Jurisdictional Statement

Appellants are 1775 independent California service station operators who are plaintiffs in a private treble damage antitrust action against the Blue Chip Stamp Company pending in the United States District Court for the Central

District of California, entitled *Twyman, et al. v. Blue Chip Stamp Company,* No. 66-1522-F. Appellants are herein appealing from an order denying their motion to intervene and to set aside a Final Judgment entered by consent on June 5, 1967, in a similar antitrust action brought by the United States against the Blue Chip Stamp Company and its chain store incorporators. Appellants also directly appeal from this Final Judgment of June 5, 1967. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Central District of California which was filed on August 18, 1967, is not yet reported but is attached hereto as Appendix A. The order of August 3, 1967, denying the motion to intervene and to vacate the consent decree, is attached hereto as Appendix B. The final judgment of the court entered on June 5, 1967, with the accompanying plans of reorganization for the Blue Chip Stamp Company, and the rejected consent decree of October 28, 1966, are attached hereto as Appendices C and D respectively.

JURISDICTION

On December 26, 1963, the United States of America filed a complaint against the Blue Chip Stamp Company; Alexander's Market; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralph's Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co., in the United States District Court for the Central District of California, under Section 4 of the Clayton Act (15 U.S.C. 4), to prevent and restrain

the above-named defendants from monopolizing the trading stamp business in California, and from otherwise violating Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). On June 5, 1967, a final judgment was entered by consent in this action after appellants had appeared and argued as amicus curiae in opposition to this judgment. On June 15, 1967, appellants—William Twyman and 1774 independent service station operators—served a motion to intervene in said action and to set aside the final judgment entered on June 5, 1967. On August 3, 1967, the United States District Court for the Central District of California entered an order denying this motion. A timely notice of appeal was filed on August 4, 1967, in the District Court. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 2 of the Expediting Act, 15 U.S.C. § 29, 62 Stat. 989 (1948). The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on the direct appeal in this case: *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. California Coop*, 279 U.S. 553 (1929).

QUESTIONS PRESENTED

I. Does the District Court have authority to reject a proposed antitrust consent decree, and to dictate the terms for and approve another consent decree which (a) substantially reduces the relief originally agreed upon between the Department of Justice and the defendants, and which (b) fails to dissipate the effects of established violations of Sections 1 and 2 of the Sherman Act, on the ground that the continuation of the unlawful monopoly is in the best interest of a segment of the public?

II. Did the District Court err in concluding that the standards of relief for monopolization cases articulated in

United States v. Grinnell, 384 U.S. 563 (1966), are not applicable to the formulation of antitrust consent decrees?

III. Is a motion to intervene, made within ten days after the entry of a consent decree in a Government antitrust action, timely under Rule 24 of the Federal Rules of Civil Procedure?

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act, 15 U.S.C. 1, 2, and 4; Section 2 of the Expediting Act of February 11, 1903, 15 U.S.C. 29; Rules 24 and 59(e) of the Federal Rules of Civil Procedure are attached hereto as Appendix E.

STATEMENT

Introduction

Appellants, who are 1775 independent California service station operators, are appealing from a denial of their motion to intervene and to set aside a consent decree[1] entered in an action under §§ 1 and 2 of the Sherman Act by the United States against the Blue Chip Stamp Company (hereinafter Blue Chip) and nine of its chain store incorporators.[2] The terms of this consent decree result primarily from the rejection by the court of an earlier consent decree. At the time of this rejection, the District Court outlined the specific terms that it believed should be included in the decree (Tr 404-7),[3] and the consent decree as entered contains those terms in substance. (See App. C).

---

1. Appellants also appeal directly from this Final Judgment of June 5, 1967.

2. These chain store incorporators are: Alexander's Market; Lucky Stores, Inc.; Ralph's Grocery Company; Market Basket; Purity Stores, Inc.; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; Safeway Stores, Incorporated; and Von's Grocery Co.

3. The following abbreviations will be used hereinafter in citing to the record: Tr—Transcript; R—Record; App—Appendix.

Appellants contend that the approved consent decree perpetuates the effects of established violations of §§ 1 and 2 of the Sherman Act, whereas the rejected consent decree (See App. D) would have dissipated these effects, thus protecting the appellants and the California public in general. Appellants submit that in accepting the second and rejecting the first decree, the District Court applied an incorrect legal standard and acted in a manner that is inconsistent with the provisions of the Sherman Act and the proper role of the District Court with respect to the entry of consent decrees.

Established Facts Concerning the Blue Chip Monopoly

The Blue Chip Stamp Company was incorporated in California in 1956 by nine competing chain store supermarkets and one chain drugstore,[4] for the avowed purpose of establishing their own mutually owned and controlled stamp company as an alternative to competing for S&H trading stamps and other trading stamps (R. 2146-7), which were then beginning to enter the California market (R. 261-2; 267-8; 467).

The company was not founded for the purpose of earning profits upon the sale of trading stamps (R. 770; 848-9); but for the purpose of curtailing the use of stamps because of the expressed view "that the distribution of trading stamps, particularly by food markets, is detrimental to the merchants, their customers and suppliers." (R. 770; 848-9).

---

4. There were three other smaller markets which were sold class B shares of stock in Blue Chip; however, the rights of these class B shareholders were severely limited and they were not even permitted to vote for nine of the eleven places on the Board of Directors (R. 285-9; 469). These holders of Class B shares and two supermarkets which subsequently sold all their class A shares (R. 220-1) were not made defendants in the government action and are not now appellees before this Court.

Prior to the formation of Blue Chip, this belief was communicated by an exchange of letters between the competing chain supermarkets (R. 261-77; 467). In these letters each chain market would indicate its opposition to trading stamps and its steadfast refusal to adopt any trading stamp plan.[5] The letters would then promise to give all the other competing chain markets "ample notice of any deviations in our policy" (R. 261; 467). The principal executives of these competing chain markets then attended a series of organizational meetings held at hotels and other places (R. 468-9; 2146-7; 1787-9). At one of these meetings Robert M. Laverty, President of Appellee Thriftimart, Inc., set forth the objectives of these competing chain markets as follows: "Fellow Grocerymen, this meeting has been called to discuss the trading stamp racket and to notify you with regard to what eight local chains have decided to do about it. That will be to form a corporation and put out their own trading stamps." (R. 1787-8). Following these organizational meetings Blue Chip was formed and each of the supermarkets received a sufficient number of shares of stock to insure a seat on the Board of Directors (R. 278-90; 219-21). In fact, the original Board of Directors consisted of one representative from each of these competing companies (R. 222-223) and at all times the representatives from these competing companies had voting control of the Board (R. 222-225; 279-290). At the first meeting of the Board of Directors, resolutions were passed which insured the accomplishment of the objectives of the company which had been previously agreed upon. It was agreed that Blue Chip stamps would

5. For example, a letter from Mr. T. A. Von der Ahe of Von's Grocery Company addressed to eleven competing markets states: "We have steadfastly resisted any type of plan involving trading stamps and will continue to do so, notwithstanding the competition offered by a comparatively few opportunists whose short-sightedness has led them into the stamp deal in this area." (R. 261; 467).

not be sold to any retailer who used another type of trading stamps (R. 295; 477-8).

It was also agreed by resolution that Blue Chip stamps would only be distributed in those geographic areas which were specifically designated by the Board of Directors (R. 296, 447-8). It was later agreed that Blue Chip stamps would not be sold to any retailer who deviated from the rate established by the chain markets for the distribution of these stamps (i.e., 1 stamp for every 10¢ of purchase) (R. 253-9; 480-8). This restriction on what in effect was the price of Blue Chip stamps was later held to be a direct violation of the Sherman Act. *Purity Stores, Inc. v. Blue Chip Stamp Co.*, C.C.H. 1963 Trade Cas. 78,589 (N.D. Calif.).

Pursuant to the resolutions adopted by the Board of Directors, Blue Chip stamps were first issued in the Sacramento area in June, 1956, simultaneously by all the competing chain store incorporators doing business in that area (R. 249-52; 296; 477-78). Gradually the sales of the company were expanded in the same manner—one geographic area at a time when the threat of S & H and other trading stamps was the greatest (R. 252; 478; 790-815). However, the company at all times tried to "delay introducing Blue Chip Stamps in any area until it becomes a problem." (R. 790). During this period between 1956 and 1960, none of the competing chain markets distributed Blue Chip trading stamps in any area not specifically designated by the Board of Directors of Blue Chip, but when a new area was designated, all would begin distributing in that area (R. 786-810). For example, prior to the passage of the required resolution of the Blue Chip Board of Directors authorizing the issuance of Blue Chip stamps in Southern California (R. 252; 301; 479) not a single Blue Chip stamp

was distributed by any of the appellee supermarkets in the entire Southern California area (R. 794, 479) although the bulk of appellees' chain supermarket grocery business apparently was then located in Southern California (R. 3). After the passage of the resolution, $500,000 was spent to popularize the stamps in Southern California (R. 252; 480) and all the competing chain stores commenced distribution of these stamps on exactly the same day (R. 479). As a result, by 1962 Blue Chip was doing 76% of the total trading stamp business in the Los Angeles area on a dollar basis and was doing 65% of the trading stamp business in the State of California as a whole on a dollar basis (R. 212; 776-78).

The Government's Complaint

On December 2, 1963, the United States filed a complaint alleging that the Blue Chip Stamp Company and the other above-named chain store incorporators of Blue Chip had by virtue of the facts set forth above monopolized the trading stamp business in California and otherwise violated §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint sought to require "each of the defendant chain stores to divest itself of ownership of all stock in Blue Chip", and to enjoin these chain stores "from controlling or attempting to control Blue Chip" and from agreeing to regulate the rate of issuance of these stamps (R. 15). All of the facts alleged in this complaint were assumed to be true by the District Court for purposes of passing on the proposed consent decrees described below (Tr. 401).

Rejection of the Decree of October 28

On October 28, 1966, a proposed consent decree (App. D) was lodged with the Court (referred to hereinafter as

Consent Decree of October 28). The decree of October 28[6], among other things, would have (1) required that the Blue Chip Stamp Company be dissolved and that its assets be sold to a new stamp company, whose management would be independent of the defendant retailers or any other business entity which purchased its trading stamps;[7] (2) enjoined the future use of the "Blue Chip" name by the successor stamp company; and (3) prevented the new stamp company from creating a vast public demand for its stamps by severely limiting the number of stamps which could be distributed as premiums on the retail sale of foods.[8]

Various grocer associations and the State of California appearing as amicus curiae objected to the proposed consent

---

6. This decree was agreed to by all defendants except Market Basket and Thriftimart. An earlier consent decree also agreed to by all defendants except Market Basket and Thriftimart was withdrawn by the United States.

7. This result was insured by not only preventing the new company "from having as an officer or employee any person who, while holding such a position, also serves as an officer, director, or employee of any person using trading stamp services", but was also insured by preventing the new company "from having, for a period of ten years following the closing date, as a director, any person who while holding such position, also serves as an officer, director or employee of any person who was a Blue Chip stockholder in 1956 or 1957", and by restraining each consenting retailer defendant "from having as an officer, director or employee any person who, while holding such position, also serves as an officer, director or employee of the new company." Proposed Final Judgment of October 28, 1966, pp. 53-4, attached as App. D.

8. This was accomplished by providing that if the government could show that "for the nine month period concluding the test" the new company distributed for use in retail food stores in the northern market area, or the southern market area, trading stamps which convert to 30% or more of the retail food store sales in that market area, then other provisions of the plan would go into effect which would reduce the number of stamps distributed on retail food sales. Such reduction was accomplished to a large degree by reducing the number of stamps distributed to large chain markets. (Proposed Final Judgment of October 28, 1966, pp. 54-60, attached as App. D.)

decree[9] arguing that the ability of California independent grocers to compete with the chain markets was due in large part to the "non-franchised trading stamp services of Blue Chip . . ." and that curtailment of Blue Chip's business, which could be accomplished by the consent decree of October 28, would seriously injure many of these small grocers and would ultimately result in a greater "concentration of economic power in the retail grocery trade" which would not be in "the public interest." (R. 2076; 2104).

The Department of Justice opposed these arguments of the various grocer associations and State of California, pointing out that § 2 of the Sherman Act and the case law do not permit the existence of a monopoly in the trading stamp industry, regardless of "speculations as to what the effects of competition in the trading stamp business might be on competition in the grocery business." (R. 2193). It was for this reason that the Department of Justice refused to agree "that the proposed judgment be modified to allow Blue Chip, or any successor company, to maintain its illegally acquired monopoly position." (R. 2193).

Hearings were held on this proposed consent decree, at the conclusion of which the District Court rejected the decree of October 28 for the reason that it would do nothing "which will destroy in any way, in any degree, the small independent grocer" because the grocery industry is "more vital to the economy of California than the stamp industry." (Tr. 458-9; Vol. 4, p. 46-7).

The District Court then outlined the terms of a decree it would consider acceptable. (Tr. 404-12; 458-9). The District

---

9. Appellants also filed a amicus curiae brief objecting to those narrow provisions of the proposed decree which it was suggested might have enabled Blue Chip to immediately transfer all its assets to the successor company without the successor company being financially responsible for damages suffered by private antitrust plaintiffs for Blue Chip's violations of the antitrust laws. (R. 2365)

Court believed such a decree should (1) allow the continued use of the Blue Chip name; (2) allow "all of the employees, particularly management of Blue Chip to go to the next company right away"; (3) allow the new company to enter "the profit field"; and (4) "at the end of a certain number of years, two or three, a sufficient period of time to insure that the new company is viable, . . . present to the court a plan to sell within a geographical area one-third of its existing business." (Tr. 404-406).

Submission and Entry of Next Consent Decree as Final Judgment on June 5, 1967

On April 28, 1967, another consent decree was lodged which substantially adopted all the terms recommended by the District Court. (App. C). On May 22, and June 2, 1967, appellants served amicus curiae briefs vigorously opposing the entry of the proposed decree, arguing that it would not dissipate Blue Chip's monopoly as required by law. (R. 2514, 2616). These amicus curiae briefs also pointed out the damaging effect of the monopoly upon independent service stations who purchased the stamps. (R. 2514; 2616).

On June 5, 1967, oral argument was held on the proposed consent decree. Counsel for appellants, as well as counsel for other interested entities, appeared and argued in opposition to the entry of this decree. (Tr. 413-502). However, the District Court rejected the arguments of appellants and others and, on June 5, 1967, signed the proposed decree (R. 2640; 2668).

Procedural Steps Taken to Challenge the Consent Decree Subsequent to Its Entry and to Perfect This Appeal

Utilizing substantially the same procedure which was employed in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), appellants, within ten days

after the entry of the consent decree as Final Judgment on June 5, served a motion to intervene and to vacate the consent decree. (R. 2691).

On July 31, a hearing was held on appellants' motions and on similar motions by the Thrifty Scrip Stamp Company (a competing California trading stamp company), and Raley Markets (a non-defendant shareholder in Blue Chip) (Tr. 502; Vol. 4, pp. 1-74).

On August 3, 1967, the Court entered an order denying appellants' motion and the other motions to intervene primarily on the ground that they were not timely. (R. 3065). On August 4, 1967, appellants filed their Notice of Appeal, appealing from the Final Judgment of June 5. (R. 3065). On August 18, 1967, the District Court filed its Opinion Denying Motions to Intervene and To Vacate Consent Decree (R. 3201-20, App. A) holding in principal part that the motions were not timely made (App. A 6-12); that this Court's opinion in *United States v. Grinnell,* 384 U.S. 563 (1966), is inapplicable to consent decrees (App. A. 17); and that the preservation of Blue Chip was necessary "in order to permit small retail businesses in California to compete with large chain establishments." (App. A. 18).

THE QUESTIONS ARE SUBSTANTIAL

I. Standards for the Acceptance or Rejection of Proposed Antitrust Consent Decrees Should Be Established by This Court

Consent decrees in government antitrust actions have been a matter of great concern for Congress and the Department of Justice since the turn of the century. Since that time District Courts have entered thousands of antitrust decrees which have set the pattern of competition for some of the nation's most important industries.[10] However,

---

10. e.g. *United States v. International Business Mach. Corp.,* 1956 Trade Cas. 71, 117 (S.D.N.Y.)

this Court has never determined whether it is proper for a District Court to reject a decree consented to by both sides; and even if it should be held that such rejection is permissible in compelling circumstances it remains to be determined when those circumstances are present. The action of the District Court in this case in rejecting a proposed consent decree dictating terms for (R. 404-08) and thereafter approving another consent decree on the ground that the dissipation of a monopoly is not in the interest of a segment of the public (R. 458-9) demonstrates the consequences of this lack of standards. This result occurred because the District Court believed that the standards for adequate relief in monopolization cases set forth in *United States v. Grinnell,* 384 U.S. 563 (1966), were inapplicable since the present case, unlike *Grinnell,* was not litigated to final judgment. (App. A. 17).

Although there are as yet no definitive standards in this area, appellants will demonstrate in the second section of this statement that the District Court's action in this case is impermissible under any standard. However, appellants will first explain why, because of certain basic changes in Justice Department policy, there is a compelling need for this Court to establish standards for the guidance of District Courts in accepting or rejecting antitrust consent decrees.

Over the years, the Department of Justice has developed regular procedures for the negotiations of antitrust consent decrees. Phillips, *Antitrust Consent Decrees,* 18 WASH. & LEE L. REV. 39, 46-50 (1961). These procedures have proved so effective that nearly three out of every four of the civil antitrust cases commenced by the Department of Justice are ended by consent decrees. Consent Decree Program of the Department of Justice, Report of the Anti-

trust Subcommittee, Committee on the Judiciary, House of Representatives, 86 Cong., January 30, 1959, p. IX. A great deal of time and effort is spent by the Department of Justice in drafting the terms of these decrees and the effects of these decrees on the pattern of competition in the industry in question is thoroughly investigated through consultations and detailed economic studies. Consent Decree Program of the Department of Justice, Antitrust Subcommittee on the Judiciary, House of Representatives, 85 Cong., Serial Number 9, pp. 431-32. Generally the courts have been reluctant to tamper with the terms of these carefully constructed consent decrees.[11] Not only has this Court indicated that the terms of these decrees should normally not be questioned, *United States v. Ward Baking,* 376 U.S. 327 (1964), see *Sam Fox Publishing Co., et al. v. United States,* 366 U.S. 683, 689 (1961), but over the years only one District Court prior to this case has seen fit to reject a government proposed consent decree. *United States v. Pan Am World Airways, Inc.,* 1959 Trade Cas. 75, 138 (S.D.N.Y.). Also, it must be noted that in that one case the District Court did not attempt, as was done in the present case, to dictate terms for inclusion in a later decree. *Ibid.*

There are good reasons for this judicial reluctance to interfere with terms of consent decrees. The specific terms of consent decrees determine the structure of competition in many of this country's major industries. For instance, the pattern of competition in the meat packing industry is set by the terms of the Swift decree, *United States v. Swift*

---

11. See M. Goldberg, "The Consent Decree: Its Formulation and Use" 20 (Michigan State University Bureau of Business Economic Research Occasional Paper No. 8, 1962). Professor Phillips states: "Generally, consent decrees are accepted and signed by the court as a routine matter." Phillips, *The Consent Decree in Antitrust Enforcement,* 18 WASH. & LEE L. REV. 39, 41 (1961).

& Company, 286 U.S. 106, 111-12 (1932). The pattern of competition in the computer industry is determined by the terms of the IBM decree, *United States v. International Business Mach. Corp.,* 1956 Trade Cas. 71, 117 (S.D.N.Y.). The pattern of competition in the telephone industry is determined by the Western Electric decree, *United States v. Western Electric Co.,* 1956 Trade Cas., 71, 134 (D.N.J.). The structure of competition in the California trading stamp industry would also have been set by the terms of the consent decree which was rejected by the District Court in the present case.

Although District Courts have in the past shown great reluctance to interfere with the terms of government proposed consent decrees, a recent change in Justice Department policy makes it inevitable that District Courts will now be frequently faced with the temptation to reject government proposed consent decrees and to insist on the inclusion of other terms in later decrees. Until recently, the Justice Department held consent decree negotiations in complete secrecy, and the terms of such consent decrees were not promulgated in advance of approval.[12] Under this former Justice Department policy, the alteration of consent decrees such as occurred in this case was not a real possibility since non-parties, such as the California Grocers Association, could not learn of the terms of a decree and formulate objections in advance of the actual approval of the decree. However, Justice Department policy has now been changed so that trade associations and other special interest groups can learn in advance of the terms of these decrees and formulate objections. 2 Fed. Reg. 6026 (1961).

---

12. Goldberg, "The Consent Decree; Its Formulation and Use" 68-69 (Michigan State University Bureau of Business and Economic Research Occasional Paper No. 8, 1962).

This case is the first case known to the appellants in which as a direct result of this new Justice Department policy a District Court has succumbed to the temptation to alter a government proposed consent decree. As will now be demonstrated, the action of the District Court in this case illustrates the need for this Court to set adequate standards for the guidance of other District Courts which will inevitably be presented with similar temptations based upon objections from other non-party special interest groups.

II. Acting Under the Erroneous Assumption That the Standards of Relief for Monopolization Cases Articulated in United States v. Grinnell, 384 U.S. 563 (1966) Were Not Applicable to Antitrust Consent Decrees, the District Court Rejected an Effective Antitrust Consent Decree and Thereafter Entered a Decree Which Will Not Dissipate Blue Chip's Illegally Acquired Monopoly

The District Court's rejection of the consent decree of October 28, its dictation of terms for, and subsequent approval of the consent decree of June 5 on the ground that nothing would be done in the case "which will destroy in any way, in any degree, the small independent grocer" because the grocery industry is "more vital to the economy of California than the stamp industry" (Tr. 458-9), conflicts with the standards for relief in monopolization cases set forth in *United States v. Grinnell*, 384 U.S. 563 (1966). This conflict arises because the District Court held that the standards set forth for relief in *Grinnell* were inapplicable to consent decrees. (App. A. 17). Appellants contend this holding is incorrect and the Court erred in imposing upon the Government a decree which in fact failed to meet this Court's standards respecting the relief to be given in monopolization cases.

(A) A consent decree must dissipate the effects of a monopoly just as thoroughly as a litigated judgment because a consent decree is not a mere contract between the parties; it is a "judicial act" and the effect of a decree is the same "whether the decree has been entered after litigation or by consent." *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).

There is simply no warrant for concluding, as did the District Court, that a consent decree in a Section 2 case should do any less than "put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power." *United States v. Grinnell, supra,* at 577. That is the standard by which Section 2 decrees are to be judged; neither history, nor precedent, nor logic permits this principle to be ignored or modified when the parties have agreed upon a consent decree.

It bears repeating that the Government proposed a decree which generally complied with the requirements of the antitrust laws as most recently articulated in *Grinnell*. Although acceptable to the parties, the Court rejected that decree which would have dissipated the taint of monopoly power. That distinguishes this case from the situation where the court is concerned that the proposed decree is not equal to the task; here the original decree was rejected by the court precisely because it was effective in the way Section 2 contemplates.[13]

---

13. That the Government *subsequently* consented to a weaker decree must not on these facts preclude review. The cases discussed, *supra*, holding that a court will not inject itself in the process of reaching consent judgments forbid what the District Court did in rejecting the first decree; those cases do not preclude review of that error merely because the Government, rebuffed by the District Court, settled for a less effective decree. In fact, the Government itself, cannot effectively seek review of the District Court's action

(Continued on next page)

The District Court erred, we submit, in concluding that the law permitted a remedy which did not fully dissipate the unlawful monopoly. One searches the lower court's opinion in vain for any justification for its bald assertion that "the authorities do not require complete divestiture where a consent decree, rather than a litigated judgment, is entered." (App. A 17.) No justification for that conclusion comes readily to mind. If the formula for relief discussed in *Grinnell* is a legal minimum, the deviation from which will (as in *Grinnell)* result in reversal, why should lesser relief be imposed merely because the Government's charges are not contested? Congress has not provided for a procedure by which monopolists may confess their past sins and, in reward for the admission, be permitted to continue to reap the fruits of their illegal conduct. The irony of the District Court's theory is that the weakest decrees are entered in the cases of defendants whose antitrust violations are so egregious that they have concluded it would be inadvisable to contest the Government's claims.

(B) In rejecting the proposed consent decree, the District Court purported to balance the interests of "the small independent grocer" against the goals of the antitrust laws. Appellant submits that the statute permits no such weighing of interests; Congress has forbidden monopolization in favor of competition, and that model may not be sacrificed to the interests of any one economic group.

This principle was aptly stated by Judge Learned Hand:

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and con-

---

in rejecting the consent decree since such rejection is not immediately appealable as a final judgment, 15 U.S.C. 29, and since such rejection would probably be considered moot should the Government elect to litigate the case to final judgment. See *MacArthur Liquors, Inc. v. Palisades Citizens Ass'n., Inc.*, 265 F.2d 372 (D.C. Cir. 1959); *Adelman v. Paramount Pictures, Inc.*, 182 F. Supp. 217 (S.D. Tex. 1960).

demn 'bad' ones; it forbad all." *United States v. Aluminum Company of America,* 148 F.2d 416, 427 (2d Cir. 1945).

Moreover, the Blue Chip monopoly was acquired in direct violation of Sections 1 and 2 of the Sherman Act. *Purity v. Blue Chip Stamp Co.,* 1963 Trade Cas., 78,789 (N.D. Cal.).

The District Court itself assumed for purposes of its decisions upon the consent decrees that the allegations contained in the government complaint had been conclusively proven "concerning all of the defendants who are before the Court" and that these allegations would have to be accepted as "established fact." (Tr. 401).

Under these circumstances, it is essential that the decree break up the monopoly because "those who violate the (Sherman) Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the pleas of hardship or inconvenience." *United States v. Crescent Amusement Co.,* 323 U.S. 173, 189 (1944). To do less confers an unwarranted benefit on defendants whose antitrust violations are so egregious that they conclude it would be inadvisable to contest the Government's claims.

The District Court's concern that the dissipation of Blue Chip's monopoly would have undesirable consequences on the grocery industry is misplaced. The question of whether some combination or restriction on trade may be permitted in one industry when the effect of such combination or restriction is beneficial in another industry has been presented to this court on several occasions. In *United States v. Crescent Amusement Co.,* 323 U.S. 173 (1944), for example, several independent theatres were convicted of monopolizing a small area of Tennessee. The defendants objected to the government decree on the grounds that

there was a great concentration of economic power among the producers of movies[14] and that the decree by weakening the power of the exhibitors would lessen competition in the industry as a whole. 323 U.S. at 187. This Court rejected the argument of the small theatre owners stating:

> "It is not for us, however, to pick and choose between competing business and economic theories in applying this law. Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination. (citations omitted.) Since Congress has made this choice we cannot refuse to sustain a decree because by some other measure of the public good the result may not be desirable." 323 U.S. at 187-8.

See also *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Kiefer Stewart v. Seagrams*, 340 U.S. 211 (1951).

This Court has also rejected the argument that hardship on some non-party group should preclude the approval of a consent decree. In *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316 (1961), the government proposed a decree following a litigated judgment which would have resulted in a tax liability of about one billion dollars on the non-defendant shareholders of du Pont. 366 U.S. at 320. For this reason the District Court rejected the decree proposed by the government and entered another decree. This Court reversed, holding that the government cannot be denied an effective remedy

> "because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an

14. Indeed at this very time the major producers, Paramount, Warner Bros., and 20th Century Fox, were being sued by the government for monopolizing the whole industry. (Tr. 50).

effective remedy would entail harsh consequences." 366 U.S. at 327.

Furthermore, in this case there is a substantial non-party group whose interests are diametrically opposed to those of the independent grocers purportedly favored by the rejection of the original proposed consent decree.[15] The record establishes the extremely injurious effects of the Blue Chip monopoly on appellants, independent California service station operators. (R. 2616-39, 2898, 2907). This injects an element not fully considered by the District Court; indeed it is precisely because the task of trying to weigh the interests of various non-party economic groups is so difficult that it ought not be attempted. The sole inquiry must be whether the decree terminates the illegal monopoly.

The District Court in this case rejected a consent decree which would have been effective in breaking up a monopoly and entered another decree which is concededly less effective (Tr. 458-59, 652-57) and which in fact is intended to preserve aspects of the monopoly because of its supposed beneficial effects in another industry. (Tr. 458-59). This approved consent decree in fact contains features which this Court found defective in *United States v. E. I. du Pont de Nemours et al.*, 366 U.S. 316, 326-335 (1961). Unlike the rejected decree, it does not require the dissolution of Blue Chip but rather permits the competing chain supermarkets to retain over 40% of their stock in Blue Chip and also permits Blue Chip's present management to acquire 10% of Blue Chip's stock. (App. C. 40-45). Although the chain supermarkets' stock is to be voted by an independent

15. The record, however, indicates that, contrary to the view of the District Court, the monopoly does not benefit independent grocers (R. 2801-68).

trustee (App. C. 42, 44), it was this sort of provision which was found defective in *du Pont*[16] for the reason that there will be the same "intercorporate community of interest" which will induce those voting the *du Pont* shares to vote them "in such a way as to induce General Motors to favor du Pont" (366 U.S. at 331), and will induce the General Motors management to act with a view to the du Pont interests. 366 U.S. at 332.

In the present case the approved consent decree also motivates appellee supermarkets to act with a view to their stock interests in Blue Chip. For instance, these supermarkets would certainly not shift their business to another trading stamp company when such a shift would not only result in Blue Chip losing the profits from their business but also would trigger the loss of at least one third of Blue Chip's present business. (R. 2625). Under such circumstances it would be impossible for a competing trading stamp company to acquire one of appellee chain supermarkets as a customer; and it is agreed that a trading stamp company must acquire such a customer before it can enter the California market. (R. 2572).

The provisions of the approved consent decree also encourage the Blue Chip management to act with a view to the interests of appellee supermarkets. The consent decree and the accompanying plans of reorganization permit the present management, which has operated the company for the past ten years, to continue to manage the reorganized company and give this management a ten percent stock interest. (App. C. 41, 43). This management, which has in the past operated the company for the benefit and under the

16. Although the *du Pont* case was brought under Section 7 of the Clayton Act, the similarity of the objective for relief in cases brought under this section with the objectives of relief in monopolization cases makes *du Pont* a fully applicable precedent.

direction of appellee supermarkets, will be disposed and motivated to operate the reorganized Blue Chip in the same manner especially when this management knows that appellee supermarkets will regain their full voting rights at the end of ten years. (App. C. 41-42).

Those provisions of the approved consent decree which require the sale of one-third of Blue Chip's business (App. C. 32-35) will also be ineffective in dissipating the Blue Chip monopoly. This provision only introduces one new trading stamp company into the California market. *Furthermore, the specific provisions of the decree relating to this sale will have the effect of allowing both the reorganized Blue Chip and the purchasing company to operate as monopolies in separate geographic areas.* In fact, the decree itself provides that "the business to be offered for sale shall be located within a contiguous geographic area within Southern California" (App. C. 33 para. IX (1)) and *prevents Blue Chip from competing with this company for a period of one year.* (App. C. 33). At the conclusion of this one-year period, with both companies thoroughly entrenched in their own geographic areas, it would be in neither company's interest to jeopardize its own position by attempting to compete in the territory of its neighbor.

In contrast, the quota or "roll back" provisions of the rejected consent decree of October 28 would have effectively dissipated Blue Chip's monopoly. In fact, the approach of these provisions is probably the only effective way to break up a monopoly in the trading stamp industry.

Blue Chip, which is the only trading stamp company in the United States owned by its chain supermarket customers,[17] gained its monopoly through the mass distribution

17. Fulop, *The Role of Trading Stamps in Retail Competition* 31 (1964); Beem, *Who Profits from Trading Stamps*, HARVARD BUSINESS REVIEW, 123, 126 Nov.-Dec. (1957).

of trading stamps on the retail sale of food. In order to break that monopoly and allow other trading stamp companies to enter the California market, it is necessary to reduce the number of Blue Chip stamps which are distributed as premiums on retail food sales. (R. 2621-23). The consent decree of October 28 had this effect by preventing the issuance of stamps by Blue Chip's successor company on more than 30% of California retail food sales.[18]

The consent decree of October 28 also nullified the great public demand for these Blue Chip stamps (R. 2119-20), arising from the mass distribution of these stamps for the last ten years, by preventing the use of the "Blue Chip" name by the successor company. (App. D. para VII (A) (4)). The approved consent decree of June 5 notably lacks a similar provision, obviously essential if the effects of the monopoly are to be eliminated.

Not only does the consent decree of June 5 fail to dissipate the Blue Chip monopoly, but the provisions of this decree which permit present users of the stamps to purchase stock at bargain prices (R. 3174) in the reorganized Blue Chip company (App. C. 40-44) will have the effect of encouraging these users to continue to purchase Blue Chip trading stamps.

This examination of the consent decrees of June 5 and October 28 in the light of the law established by this Court establishes that the District Court used an incorrect legal

---

18. This result was accomplished by setting up certain test periods and by providing that certain quota or "roll back" limitations would go into effect if more than 30% of the successor company's stamps were distributed on retail food sales in the test areas. (App. D. para. VIII (B) 1.). The brunt of the reductions in stamp usage if this quota or "roll-back" provision went into effect would fall primarily upon the large chain markets since small food retailers doing less than $500,000 a year and service stations were exempt from these "roll-back" provisions. (App. D. para. VIII (B) 4).

standard and that such use had the naturally expected effect—the consent decree of June 5 is totally ineffective in dissipating the monopoly and in fact will serve to perpetuate it.

III. Appellants' Motion to Intervene Was Timely

The District Court denied appellants' motion to intervene and to vacate the consent decree primarily on the ground that these motions were not timely. (App. A. 6-12). Although there are other requirements for intervention set forth in Rule 24 of the Federal Rules of Civil Procedure, because of the District Court's opinion and this Court's decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the question of timeliness is the only requirement which merits discussion at this time.[19]

Rule 24(a) of the Federal Rules of Civil Procedure states:

> "Upon timely application anyone shall be permitted to intervene in an action. . . ."

The only relevant date respecting the timeliness of appellants' motion is the date when appellants first received a copy of the consent decree ultimately approved by the

---

19. Although the District Court's opinion holds that appellants do not meet the other requirements of Rule 24 F.R.C.P., the opinion assumes as a premise that appellants would meet such requirements if in fact the approved consent decree is defective. (App. A. 13-14). Indeed, the conclusion that appellants would meet the other requirements of Rule 24 F.R.C.P. if the consent decree is defective is obviously correct because if the decree is defective, and allows a continuation of the monopoly, appellants would in the language of Rule 24 certainly (1) "claim an interest relating to the property or transaction which is subject of the action," (2) be "so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest" and (3) "not be adequately represented by existing parties." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

Court. Prior to this date appellants had every reason to assume that the government would protect their interests by proposing a decree which would dissipate Blue Chip's illegally acquired monopoly. Appellants first received a copy of the defective consent decree on May 15, 1967, only twenty days before the scheduled date for the approval of this consent decree. (R. 3033-34).

After appellants had had an opportunity to inspect the proposed decree and accompanying plans of reorganization and discovered that the decree would not dissipate the monopoly, they served on May 22, 1967, an amicus curiae brief opposing the entry of the proposed decree. (R. 2537). This was the only course of action available to appellants because the local Court rules prevented a formal motion to intervene in advance of the date scheduled for the approval of the decree without special court order. Local Rules for Central District of California, Rule 3(e)(1). The statement of the District Court that "if petitioners had time to make known their opposition to the decree, (by serving amicus curiae briefs), they had time to file their applications to intervene" (App. A 7), ignores this fact.

The remarks of the Court also ignore the extra time which would have been required to research and prepare a motion to intervene and the extensive proceedings which were then occurring in appellants' own private antitrust action against the Blue Chip Stamp Company. (R. 3034). Under these circumstances appellants' filing of amicus curiae briefs (R. 2537, 2616) and their oral argument in opposition to the decree (Tr. 462-78) were the only effective and expeditious means of informing the District Court of their substantive objections to the proposed decree.

In addition, there was no possible injury or even inconvenience to the Court or to the parties by the approach

taken by appellants; their views were made available to the Court by the filing of *amicus* briefs. This served the identical function that intervention would have at that point. It was only *after* the decree was entered and appellants wished to protest and, if necessary, appeal from the decree as entered that it became necessary to file a formal motion to intervene.

Within ten days after the entry of the decree, appellants served their motion to intervene and to vacate the judgment. (R. 2691-99). This they were clearly entitled to do under the Federal Rules of Civil Procedure and the applicable case law.

Rule 59(e) of the Federal Rules of Civil Procedure states:

> "A motion to alter or amend a judgment shall be served not later than 10 days after entry of judgment."

Appellants' motion was made within the prescribed time limit and is therefore timely.

This Court has already held that a motion to intervene made after the entry of a consent decree is timely. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). An examination of earlier cases discloses that motions to intervene have always been denied when made in advance of the entry of a government proposed antitrust consent decree and have only been granted when made after the entry of these decrees.[20]

---

20. Petitions to intervene made in advance of the entry of a decree were denied in the following cases. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *Sutphen Estates, Inc., v. United States*, 342 U.S. 19 (1951); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 173 (1944); *United States v. Radio Corp. of America*, 186 F. Supp. 776 (E.D. Pa.), *appeal dismissed*, 364 U.S. 518 (1960); *United States v. Loew's Inc.*, 20 F.R.D. 423 (S.D.N.Y. 1957); *United States v. Loew's, Inc.*, 186 F.

(Continued on next page)

CONCLUSION

The District Court's entry of a consent decree which does not conform with the standards set forth in *United States v. Grinnell*, 384 U.S. 563 (1966), and which permits the continued existence of an illegal monopoly on the grounds that it allegedly benefits independent retail grocers presents substantial questions of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

HOWARD, PRIM, SMITH, RICE & DOWNS
HOWARD M. DOWNS
STUART R. POLLAK
A. JAMES ROBERTSON, II
Attorneys for Appellants and Petitioners for Intervention

Supp. 13 (S.D.N.Y. 1955); *United States v. Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo. 1955); *United States v. American Soc'y of Composers, Authors & Publishers*, 11 F.R.D. 511 (S.D.N.Y. 1951); *United States v. General Elec. Co.*, 95 F. Supp. 165 (D.N.J. 1950).

Petitions to intervene made after the entry of decree were granted in the following cases: *Missouri-Kansas Pipe Line Co., v. United States*, 312 U.S. 502 (1941); *United States v. Vehicular Parking, Ltd.*, 7 F.R.D. 336 (D. Del. 1947); *United States v. California Co-op. Canneries*, 279 U.S. 553 (1929) (dictum); *United States v. Terminal R.R. Ass'n.*, 236 U.S. 194 (1915); *Olympic Ref. Co. v. Carter*, 332 F. 2d 260, (9th Cir.) *cert. denied*, 379 U.S. 900 (1964); *United States v. Swift & Co.*, 286 U.S. 106 (1932).

(Appendices follow)

Appendix A

Filed Aug 18, 1967

Clerk, U. S. District Court
Central District of California

In the United States District Court
Central District of California

Civil No. 63-1552-F

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

Independent California Service Station Operators, plaintiffs in the action of Twyman, et al. v. Blue Chip Stamp Company, et al.,
Petitioners for Intervention

Raley's, a corporation,
Petitioner for Intervention

Thrifty Shoppers Scrip Co.,
Petitioner for Intervention

OPINION DENYING MOTIONS TO INTERVENE AND TO VACATE CONSENT DECREE

On June 5, 1967, the Court approved and signed a consent decree in this antitrust action. Subsequent thereto Petitioners for Intervention filed motions which seek—

(a) to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure;

(b) to be permitted to intervene under Rule 24(b); and

(c) to vacate the consent decree of June 5, 1967.

At the conclusion of argument on July 31, 1967, the Court orally announced its decision, and by minute order denied the motions. This opinion is written in order to permit a studied examination of the Court's views.

BACKGROUND

On December 26, 1963, the United States filed its complaint alleging that Blue Chip Stamp Company, Thrifty Drug Stores Co., Inc. (the largest pharmacy chain in California) and eight grocery chains (whose 1962 sales constituted 30 percent of all sales of grocery stores in California) had since 1955 engaged in a conspiracy in restraint of trade, and had monopolized the trading stamp business in California, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint sought an injunction against continuation of the activities charged and asked that the defendant retailers be enjoined in the future from using Blue Chip stamps.

After the case was filed, the Government and the defendants engaged in detailed negotiations to settle the litigation by consent decree. These negotiations extended over two years in time, and the Government afforded an opportunity to all defendants and to all other parties expressing an interest in the case to be heard. As a result of these negotiations, three separate consent decrees were proposed, each of which was lodged with this Court. In order that interested parties might have time to study each proposed decree and

to make known their views with respect to it, there was annexed to each decree a stipulation providing that all signatory parties consented to entry of the given decree after 30 days unless the Government withdrew its consent during the 30-day period.

On July 22, 1966, the first proposed decree was lodged with the consent of all parties except defendants Market Basket and Thriftimart. The two non-consenting defendants as well as the State of California, Certified Grocers Association, and California Grocers Association (all non-parties), raised objections to the decree before the 30-day period had expired. The Government then withdrew its consent and the decree was withdrawn.

Following further negotiations, a second decree was drafted and lodged with the Court on October 28, 1966. The annexed stipulation to the decree was signed by the Government and all defendants except Market Basket and Thriftimart. The Government and the consenting defendants filed briefs in support of the decree. The two non-consenting defendants, and the California Grocers Association, Certified Grocers Association, S & H Stamp Company, and the State of California filed briefs in opposition to entry of the decree. On December 13, 14 and 15, 1966, this Court held hearings, and all parties favoring or opposing the decree were given opportunity to be heard. At the conclusion of the hearings, the Court refused to sign the proposed decree and outlined certain requirements it believed essential to any decree settling the case.

On April 28, 1967, a third decree was lodged, consented to by all defendants. The Court ordered notice should be given to all parties previously appearing in the case, including parties *amici curiae*. Argument was set for June 5, 1967. Such notice was given. Briefs in favor of this third pro-

posed decree were filed by the Government, all defendants, and also by the State of California, the California Grocers Association, and Certified Grocers Association, who had been active in opposing the earlier decrees. Briefs *amici curiae* in opposition to the proposed decree were filed by the petitioners herein, by S & H Stamp Company, and by Gold Bond Stamp Company. After a study of the briefs and consideration of the oral arguments, the Court signed and entered the proposed decree on June 5, 1967.

DESCRIPTION OF PETITIONERS

Independent California Service Station Operators are plaintiffs in the case of *Twyman et al. v. Blue Chip Stamp Company et al.*, Civil No. 66-1522-F, now pending before this Court. The complaint therein alleges substantially the same violations as those alleged in the Government complaint (violation of Sections 1 and 2 of the Sherman Act). Likewise, the Government complaint is incorporated in the petition to intervene. The service station operators suing in *Twyman* and seeking to intervene here claim that by virtue of the Blue Chip trading stamp monopoly, a customer demand has been created for trading stamps, so that service station operators must give trading stamps. It is alleged that by being thus forced to give trading stamps and by being forced to obtain said trading stamps from a monopoly, the service station operators are damaged. Their complaint seeks threefold damages under the provisions of 15 U.S.C. § 15.

Thrifty Shoppers Scrip Co. is a stamp company which competes with Blue Chip. It has filed an action in this Court, *Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Co.*, No. 67-596-F, against the same defendants as are here, alleging injury in its efforts to compete in the trading stamp busi-

ness in California due to the restraints of trade and the monopolization by the defendants. Thrifty seeks threefold damages.

Raley's, Inc., a retail grocery chain, also is the plaintiff in a civil action now pending before this Court. A 2% stockholder of Blue Chip, Raley's is suing on behalf of said company and other stockholders. *Raley's et al. v. Alexander's Markets et al.*, Civil No. 64-660-F. Named as defendants are Blue Chip, the other defendants in the Government suit, and certain individual shareholders of Blue Chip Stamp Company. Raley's complaint alleges violation of Sections 1 and 2 of the Sherman Act, and prays for money damages, for a decree requiring the defendants to sell their stock in Blue Chip Stamp Company, and for an injunction prohibiting the defendant shareholders from participating in future profits of Blue Chip. In 1966 Raley's commenced using Gold Bond stamps. From 1959 to 1966 it had used its own stamps; prior to 1959 it had used Blue Chip.

RULE 24

The applicable Rule is Rule 24, Federal Rules of Civil Procedure:

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

QUESTIONS PRESENTED

The questions presented are (1) whether petitioners have a right to intervene [Rule 24(a)], or (2) should be permitted to intervene [Rule 24(b)] in an action brought by the Government and subsequently settled, with the consent of the Court after a full hearing, and, (3) whether, ancillary to this, the petitioners have a right to have the consent decree vacated.

THE PETITIONS WERE NOT TIMELY

Rules 24(a) and 24(b) specifically provide for intervention only upon "timely application". The present motions were neither served nor filed until after June 5, 1967, the date the consent decree was entered. Twyman's motion was filed June 19, 1967; Thrifty Shoppers' on July 12, 1967; and Raley's on July 14, 1967. The rule for intervening after

entry of a final judgment is set forth in Barron & Holtzoff, Fed. Prac. & Proc., vol. 2, ¶ 594:

> "Intervention may be allowed after a final judgment or decree if it is necessary to preserve some right which cannot otherwise be protected, but such intervention will not be permitted unless a strong showing is made."

Petitioners have failed to make any showing at all as to any right which can only be protected by intervention. Furthermore, there is no showing that their applications are "timely".

Each petitioner claims it demonstrated its opposition to the decree by filing an *amicus curiae* brief and by arguing in opposition to its entry. However, if petitioners had time to make known their opposition to the decree, they had time to file their applications to intervene.

In *United States v. Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Maine 1954), *aff'd*, 221 F.2d 957, *cert. denied*, 350 U.S. 842, the Court stated:

> "Although the determination of timeliness involves a consideration of a number of factors and the time element alone is not controlling, a strong showing must be made by the applicants in order to be allowed to intervene after the entry of a final judgment. See 4 Moore's Federal Practice, 2d Ed., Par. 24.13." 17 F.R.D. at 102.

In *Slusarski v. United States Lines Co.*, 28 F.R.D. 388, 390 (E.D. Pa. 1961), the Court stated: "Where, as here, all issues have been resolved and the litigation concluded, with entry of judgment, we think the application is clearly too late." For similar rulings see *Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965), appeal dismissed—*cert.* improvidently granted, 384 U.S. 28; *Kaplan v. Guardian Life Ins. Co. of Amer.*, 231 F.Supp. 874, 876-77 (W.D. Mo. 1964);

Union Nat. Bank of Youngstown, Ohio v. Superior Steel Corp., 9 F.R.D. 124 (W.D. Pa. 1949).

Rule 24 fails to provide any standard by which timeliness may be tested. Thus, it is necessary to look to all the circumstances in a given case. However, the courts do not look with favor upon one who, fully aware of what has transpired, nonetheless fails to act on his rights and is unreasonably tardy in filing a petition for intervention. Thus, it has been stated:

> "... we might say we do not see any reason why these interveners could not have sought intervention much earlier. The Court should also consider the state of the cause. That is, as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have in effect slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania. We do not feel that this is a function of a district court." *Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corp.*, 24 F.R.D. 476, 477 (W.D. Pa. 1959).

The requirement of timeliness is not without foundation. The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances. Such circumstances are not present here. Petitioners have for some time been aware of the existence and nature of the negotiations leading to the final decree entered by this Court. They have been

given every opportunity to be heard. Had they felt their interests were not being given adequate consideration, they should have moved to intervene. They chose not to do so, but rather waited until lengthy and complex negotiations had been completed, all arguments of *amici* in opposition to the three proposed decrees had been heard, and a consent judgment entered, before ultimately seeking to intervene.

Petitioners cite *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960), as purported authority for the proposition that intervention is proper after entry of a consent judgment. However, *Kozak* is not applicable here. In that case the motion to intervene came *prior* to entry of the decree and before the issues had been drawn. The opinion did note, however, that "There are even occasions where intervention is proper after judgment." But such cases have typically involved a refusal or unwillingness by the losing party to diligently prosecute the lawsuit, this fact not becoming apparent until after the Court's decision. *E.g.*, *Hurd v. Ill. Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956) (intervention granted at appellate level where in a spurious class action it appeared that certain members of the class doubted the faithfulness of the named plaintiff in prosecuting the appeal on behalf of the class); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953) (intervention granted for purposes of prosecuting appeal by a stockholder who learned after judgment had been entered against the corporation, that the corporation had decided not to appeal, despite the fact that the corporation's suit against its officers to recover allegedly improper profits had been instigated at the request of this stockholder); *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 777 (intervention granted for purposes of prosecuting

appeal because affected property owners did not learn until after judgment that the zoning commission did not intend to appeal an adverse judgment). Under circumstances such as these, where the inadequate representation of the petitioner's interest comes to light only after entry of the decree, the courts have been willing, with good reason, to recognize an exception to the general rule forbidding intervention after entry of the decree. This exception has been narrowly defined: "Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected." *Wolpe v. Poretsky, supra,* 144 F.2d at 508.

Referring again to *Kozak, supra,* the motion to intervene therein, as noted above, was filed before entry of final judgment. Thus, *Kozak* is not authority excusing petitioners here from the necessity of making a "strong showing" as to why they did not proceed more diligently. The delay in serving and filing the motions cannot be overlooked when considered in light of the injury sure to result to the public should implementation of the decree be postponed.

Petitioners contend they meet the requirement of timeliness since the *El Paso* case [*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967)] holds that even after entry of the consent judgment, intervention may be permitted. Whether or not this is in fact the holding in *El Paso,* it is clear that that case does not rewrite Rule 24(a) and (b) to eliminate the requirement of timeliness. After the Supreme Court ordered divestiture, *United States v. El Paso Natural Gas Co.,* 376 U.S. 651 (1964), the District Court held hearings on the form of relief. Twenty parties, including the State of California and Cascade Natural Gas Corp., filed motions to intervene. These

motions were filed and denied *before* the District Court entered its consent decree. Thus, in the opinion whereby intervention was denied, the District Court stated, "All that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court." *U.S. v. El Paso Natural Gas Co.*, 37 F.R.D. 330, 332 (D. Utah 1965). Of the 20 prospective intervenors, California, and Cascade Natural Gas Corp., appealed to the Supreme Court, along with Southern California Edison Co., which had petitioned to intervene at a later date. The Supreme Court reversed, permitting intervention. The Court's opinion, per Mr. Justice Douglas, does not even discuss timeliness.

As noted above, California, and Cascade Natural Gas Corp., both sought intervention well in advance of entry of the consent decree. It is not clear when the petition of Southern California Edison Co. was filed. However, on these facts, and in view of the fact that the Supreme Court did not discuss timeliness or the dates the petitions were filed, it is clear that *El Paso* cannot be taken as authority for the proposition that intervention may be permitted after entry of a consent decree.

In *El Paso*, the Supreme Court observed that it had a right to protect and to insure obedience to its own previous mandate. Similarly, this Court likewise has broad powers to protect and interpret decrees which it has approved and issued. Obviously, a ruling by a court that intervention is proper to insure compliance with its earlier mandate is no authority for asserting that a court, which has issued a mandate, should permit intervention for the purpose of attacking the mandate. In this respect, *El Paso* is actually authority for the denial of the instant motions to intervene, because the present Court has power to interpret and enforce the mandate which it has issued.

This interpretation of *El Paso, supra,* has been sustained in the most recent session of the Supreme Court. The Government had prevailed in an action brought to force Alcoa to divest itself of Cupples. *(United States v. Aluminum Company of America,* 233 F. Supp. 718, 247 F. Supp. 308 (E.D. Mo. 1962), *affirmed per curiam,* 382 U.S. 12.). During the pendency of the action, and subsequent negotiations for divorcement, Alcoa and Cupples bid on a contract to supply aluminum curtain walls for the proposed New York Port Authority building, under an agreement that if Alcoa were forced to divest itself of Cupples, it would relinquish the contract to Cupples. Lupton Manufacturing Co. also bid to supply aluminum curtain walls for the building. When the order of divorcement became final, Lupton moved to intervene under Rule 24(a) and (b). Lupton did not contend that it had a right to bid free from competition, but rather asserted that if Cupples were permitted to retain the contract it would retain part of the profit of an illegal merger, and thereby frustrate the purposes of the Government's case, namely, to restore free and open competition in the aluminum curtain wall industry. The District Court denied Lupton's motion to intervene and a direct appeal was taken to the Supreme Court. *United States v. Aluminum Company of America and Cupples Products Corp.,* 41 F.R.D. 342 (E.D. Mo. 1967), appeal to Supreme Court dismissed, 87 S. Ct. (Adv.) 2112 (June 12, 1967).

PETITIONERS HAVE NO RIGHT TO INTERVENE UNDER RULE 24(a)

Rule 24(a) governs intervention as of right. In addition to the requirement of "timely application", 24(a) further requires that a prospective intervenor claim—

". . . an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest. . . ."

Petitioners have not demonstrated the existence of any "interest relating to the property or transaction" which is the subject of the Government's suit which might support their applications to intervene.

Each petitioner has filed an action, pending in this Court, charging the defendants with substantially the same antitrust violations as those charged in the Government's case. They seek damages for the injuries suffered as a result of these violations. None of their "interests" are in any way "impaired or impeded" by settlement of the Government's case. Nor is their ability to prosecute their respective cases impaired or impeded by the Government's case. The speculation that petitioners may be benefited in the trial of their respective cases if the Government is forced to litigate its case certainly does not give them an "interest" in the Government's case sufficient to support the motions to intervene.

If the petitioners are appearing merely as members of the public, in the public interest, then it is incumbent upon them to establish that the Government has not acted properly in the public interest. This they have not done. Congress has vested in the Department of Justice the duty of instituting proceedings in equity to prevent and restrain antitrust violations. (15 U.S.C. § 4.). Acting on behalf of the public interest in the present matter, the Government first investigated, and then filed its complaint seeking to restrain the violations and to dissipate the monopoly revealed by its investigation. Substantial effort was

expended both in preparing the case for trial and in seeking to negotiate the consent decree, here challenged, to attain the two principles for which the case was originally filed. The decree enjoins those trade restraints alleged to be illegal in the complaint, and provides for drastically reducing the power of the defendant retailers over Blue Chip Stamp Company; defendant retailers are enjoined from acting in concert in the trading stamp industry in the future. The monopoly power of Blue Chip is decreased, and competition is opened.

PETITIONERS SHOULD NOT BE PERMITTED TO INTERVENE UNDER RULE 24(b)

Generally speaking, the right to intervene to defeat entry of a consent decree in any government antitrust action has been consistently denied.

In *Sutphen Estates, Inc. v. United States,* 342 U.S. 19 (1951), the facts were that after the decision in *United States v. Paramount Pictures, Inc. et al.,* 334 U.S. 131 (1948), Warner Brothers Pictures Corporation was ordered reorganized in a manner similar to divestiture. Sutphen Estates had leased property to a Warner affiliate and Warner had guaranteed the lessee's performance of the lease. Intervention was sought by the lessor to protect its rights against Warner as guarantor. Intervention was denied because the lessor was not a privy of Warner and the "reorganization" decree would not bind the lessor in any legal sense. The Court stated that ". . . the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene". 342 U.S. at 23.

In *Sam Fox Publishing Co. et al. v. United States,* 366 U.S. 683 (1961), the District Court denied certain music

publishers intervention in proceedings for the modification of a prior consent decree in a government antitrust suit. On appeal, the Supreme Court, per Justice Harlan, stated:

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. In *United States v. Borden Co.*, 347 U.S. 514, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in clearest terms that 'private and public actions were designed to be cumulative, not mutually exclusive' *(id.,* at 518). . . ." 366 U.S. at 689.

See also, *United States v. Loew's, Inc. et al.*, 20 F.R.D. 423 (S.D. N.Y. 1957).

In *United States of America v. Radio Corporation of America,* 186 F. Supp. 776 (E.D. Pa. 1960), *appeal dismissed,* 364 U.S. 518, a competitor of the defendant attempted to intervene after a consent decree had been entered, for the purpose of objecting to proposed acquisitions to which the Government did not object. The Court denied intervention, as under the consent decree it had retained jurisdiction only to allow any of the parties to the final judgment—no one else—to apply to the Court for further orders or directions. However, the Court also stated:

> "The Government opposes the motion for intervention and has informed the Court that it has carefully investigated and reviewed all the facts and reached the conclusion that the proposed Boston and San Fran-

> cisco acquisitions do not violate the decree. In this state of facts, even if I had discretion to allow the intervention, I would not do so. The Government is concerned with the public interest and is satisfied that the conduct which Westinghouse complains of is not against that interest. It would not lead to an orderly administration of justice to allow intervention in this type of antitrust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained. The movant, if it is aggrieved, must be left to such private remedy as Congress may have provided for it." 186 F. Supp. at 776-777.

This language is particularly significant for the case at bar, where the Government opposes intervention and where the proposed intervenors have already commenced pursuit of private remedies.

PETITIONERS' MOTIONS ARE WITHOUT MERIT

There is no merit to the claims petitioners seek to advance; intervention should thus be denied. In *Marx v. Maddrey,* 106 F. Supp. 535 (E.D. N.C. 1952), petitioner moved to intervene and to set aside an order previously entered. The Court denied intervention on the ground that the arguments raised in opposition to the order were without merit.

Petitioners here do nothing more than reiterate arguments previously presented; they fail to raise any additional arguments not already heard at length and denied by this Court. To permit intervention and vacation of the decree so that these very same arguments can be heard again would impose an unwarranted burden on the parties and the Court.

In support of their contention that their claims should be heard, petitioners cite *United States v. Grinnell*, 384 U.S. 563 (1966), for the proposition that complete destruction of the monopoly power is the standard of relief in monopolization cases. However, the reliance on *Grinnell* is misplaced. Unlike the case at bar, *Grinnell* was litigated to judgment; there was no consent decree. The authorities do not require complete divestiture where a consent decree, rather than a litigated judgment, is entered. The decree herein is designed to limit the powers of Blue Chip and to open up and increase competition in the stamp industry in California, while at the same time preserving the legitimate interests of the users of Blue Chip stamps. This is consistent with the principles embodied in the antitrust laws.

The consent judgment is indispensable to antitrust enforcement. The Government notes that seventy percent of their antitrust judgments are consent decrees. Such decrees result from negotiation, thus typically may provide something less than the full relief prayed for (and often something more than that which the Government could obtain after trial). Litigation that might proceed for many years is avoided by utilization of this procedure. Its legality is beyond question. In *Sam Fox Publishing Co., supra,* the Supreme Court observed that:

> "Apart from anything else, strong policy would strongly lead us to decline appellant's invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." 366 U.S. at 689.

As petitioners have not furnished the Court with anything beyond that which has already been carefully considered and rejected upon ordering entry of the consent decree, there is nothing to be gained and much to be lost by vacating the decree.

Petitioners, when asked by the Court to present in substance a decree which would better serve the public were unable to do so. Their arguments are general and without economic substance. This Court has determined that it is essential that there be a viable non-franchised stamp company which can compete with the strong franchised ones, in order to permit small retail businesses in California to compete with large chain establishments. At the present time there is only one non-franchised stamp company in California, Blue Chip. The decree, among other matters, provides that one-half of Blue Chip's Southern California business must be sold to a purchaser who will operate on a nonfranchised basis. This is the most practical way to increase competition in the retail trading stamp business that has been advanced in 3½ years, and petitioners' arguments against the decree are so shallow as to be devoid of merit.

Dated this 18th day of August, 1967.

/s/ WARREN J. FERGUSON
Warren J. Ferguson
United States District Judge

Appendix B

Filed Aug 3 1967
Clerk, U.S. District Court
Central District of California

United States District Court
Central District of California

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

Civil No. 63-1552-F

ORDER DENYING MOTIONS

WHEREAS, on October 28, 1966, the Government and all but two defendants lodged a proposed decree settling the above action as to said parties and the proposed decree was set for argument December 13, 1966; and

WHEREAS, said hearing received wide publicity and numerous parties filed briefs *amici curiae* opposing the proposed decree or made appearances at the argument and argued in opposition to said decree; and

WHEREAS, on December 13, 14 and 15, 1966, argument by all parties and by numerous *amici curiae* was heard by the Court, which thereon determined not to enter the proposed decree and outlined certain principles to be considered in any decree settling the case; and

WHEREAS, on April 28, 1967 a proposed consent decree was lodged settling the case as to all parties and the matter was set down for argument June 5, 1967, with notice being given all persons shown by the record as having appeared as *amici curiae* in said case; and

WHEREAS, numerous persons filed briefs *amici curiae* in opposition to said proposed consent decree, including Thrifty Shoppers Scrip Co. and Independent California Service Station Operators; and

WHEREAS, on June 5, 1967 numerous persons appeared in opposition and made oral argument in opposition to said proposed decree, including the two persons just named and Raley's, Inc., who at that time presented both written and oral argument, following which said proposed final judgment was duly signed and entered; and

WHEREAS, the persons listed below served the motions indicated relative to said judgment:

(i) On June 15, 1967, the Independent California Service Station Operators served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure and a motion to vacate said judgment;

(ii) On July 14, 1967, the Independent California Service Station Operators served a motion under Rule 15(a) of the Federal Rules of Civil Procedure to substitute an amended complaint in intervention for the complaint in intervention previously served and filed by it;

(iii) On July 7, 1967, Thrifty Shoppers Scrip Co. served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure and a motion to vacate said judgment; and

(iv) On July 14, 1967 Raley's Inc. served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure; and

WHEREAS, notice having been duly given, memoranda of authorities having been submitted by said movants in favor of their motions and by all parties to said judgment in opposition to said motions, and the matter having come on to be heard on July 31, 1967 and oral argument being heard and considered;

IT IS HEREBY ORDERED that all said motions be denied for the following reasons among others:

Said motions were not made upon timely application;

No sufficient interest in the subject matter of said judgment has been established by any of said movants;

All interests of each of said movants are included within these public interests which have been considered and safeguarded by the action of the Government herein;

Each movant has failed to establish any valid reason why said judgment should be altered; and

To grant any said motion would unduly delay and prejudice the rights of the parties hereto.

Dated: August 3, 1967.

WARREN J. FERGUSON
United States District Judge

Approved as to form:
O'Melveny & Myers
By WILLIAM W. ALSUP
Attorneys for Blue Chip Stamp Company;
Alexander's Markets; Lucks Stores, Inc.;
Market Basket; Purity Stores, Inc.;
Ralphs Grocery Company; Safeway Stores,
Incorporated; Thrift-mart, Inc.;
Thrifty Drug Stores Co., Inc.; and
Von's Grocery Co.

Appendix C

Lodged—Apr 28 1967
Clerk, U. S. District Court
Central District of California

Filed Jun 5, 1967
Clerk, U. S. District Court
Central District of California

United States District Court
Central District of California

Civil No. 63-1552-F

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint in the United States District Court for the Southern District of California, Central Division, on December 26, 1963; each of the defendants having appeared and filed its answer denying the substantive allegations thereof; and the plaintiff and the defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue

of fact or law herein, without the taking of any evidence, and without this Final Judgment constituting any evidence or admission by any party in respect to any issue of fact or law herein;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties consenting hereto. The complaint states claims for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act.

II.

For the purposes of this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, association, corporation or other legal or business entity;

(B) "Trading stamp business" shall mean the distribution for compensation, of trading stamps to any person for issuance to its customers, employees or others, and the redemption of said stamps for merchandise or money;

(C) "Trading stamp company" shall mean a person engaged in the trading stamp business;

(D) "Capital Assets" shall mean land, buildings, leasehold improvements, furniture and fixtures, warehouse equipment, delivery equipment and automobiles.

(E) "Southern California" is that part of California south of the line formed by the northern boundaries of San Luis Obispo, Kern and San Bernardino Counties.

(F) "New Blue Chip" shall mean a purchaser of, or any other successor to, Blue Chip's trading stamp business pursuant to Section VI herein or a reorganized company pursuant to Sections V or VII herein.

(G) "Reorganization" shall mean a reconstitution of the stock structure of Blue Chip and shall include the creation of a new company to which the assets and liabilities of Blue Chip are transferred, or into which Blue Chip is consolidated or merged.

III.

The provisions of this Final Judgment applicable to any defendant and any person agreeing to be bound shall also apply to each of its subsidiaries, successors, assigns, officers, directors; and employees, and to all other persons in active concert or participation with such defendant or persons who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between or among such defendant or person and its officers, directors, employees, parent company, subsidiaries and affiliates, or any of them.

IV.

Each of the retailer defendants is enjoined and restrained from:

(A) Combining or conspiring to restrain trade in, or monopolizing or attempting to monopolize the trading stamp business in the State of California; or carrying out, directly or indirectly, any such combination, conspiracy, attempt to monopolize or monopolization;

(B) Entering into any contract, agreement or understanding with any other user of trading stamps in the same line of business:

(i) To refrain, in the State of California or in particular areas thereof, from using trading stamp services entirely or from using the trading stamp services of any particular person or persons; or

(ii) To limit the rate of issue employed in distributing trading stamps to their respective customers in such state;

(C) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company to operate in the State of California except as provided in Sections V, VI or VII hereof.

Provided, that this Section IV shall not apply to a retailer defendant, acting independently: (i) in obtaining or entering into any contract to obtain trading stamp services from any trading stamp company; or (ii) when such defendant is engaged in the trading stamp business (either directly or through a subsidiary or affiliate), in furnishing or entering into any contract to furnish trading stamp services to any person, and provided further that this Section IV shall not apply to the provision of trading stamp services by any trading stamp company which is not named as a defendant herein.

V.

Blue Chip is ordered and directed to present to the Court, within 60 days following the date of entry of this Final Judgment, a plan for the reorganization of Blue Chip Stamp Company. The plan shall be substantially in accordance with either of the plans heretofore furnished

to plaintiff. Upon approval of the plan by the Court, Blue Chip shall make bona fide and diligent efforts to reorganize the company pursuant to the said plan. If at any time, in plaintiff's judgment, such efforts are not being made, plaintiff may apply to the Court for an order directing that this Section V shall no longer apply. In the event that such order issues, Blue Chip shall be required to divest pursuant to Section VI or to reorganize pursuant to Section VII hereof.

VI.

(A) In the event that Section V becomes inapplicable Blue Chip is ordered and directed to divest, with all due diligence, within 15 months from the date upon which Section V shall no longer apply, all of the company's capital assets, goodwill, and the right to the service mark and to the use of the name "Blue Chip," and, following such divestiture, to discontinue issuance of trading stamps, cease doing business as an operating company and thereafter to wind up its affairs and dissolve consistent with the applicable laws of the State of California. The divestiture shall be made upon the following terms and conditions:

(1) The purchaser or successor to Blue Chip's trading stamp business shall agree to enter its appearance in this proceeding and shall furnish its written consent to be bound by the applicable provisions of this Final Judgment.

(2) The purchaser or successor shall agree to engage in the trading stamp business in California for a reasonable period of time.

(3) The purchaser or successor shall contract with Blue Chip on mutually satisfactory terms for the redemption of all outstanding trading stamps thereto-

fore issued by Blue Chip and said contract shall insure discharge of Blue Chip's redemption obligations and shall require the purchaser or successor to redeem its stamps interchangeably with the trading stamps theretofore issued by Blue Chip.

(4) The purchaser or successor shall assume such other obligations as Blue Chip and it may agree and Blue Chip shall transfer such cash, securities or other assets as it and Blue Chip may agree.

The said divestiture may be made by a sale of assets, a sale of stock of a corporation which controls the assets, or in any other manner not otherwise inconsistent with the terms of this decree. Provided, that in the event that all of the stockholders of Blue Chip dispose of their stock to a purchaser or successor said disposal shall be regarded as a divestiture by Blue Chip for the purposes of this Final Judgment.

(B) Blue Chip shall make known the availability of the assets for sale. Blue Chip shall furnish to bona fide prospective purchasers making inquiry to it, such information as is reasonably necessary for them to proceed with negotiations looking toward the ultimate acquisition of the assets to be divested and shall furnish plaintiff concurrently with the name of any such prospective purchaser. Blue Chip shall render quarterly reports to the Assistant Attorney General in charge of the Antitrust Division concerning its efforts to effectuate the divestiture required, the first such report to be rendered within 30 days of the date that Section V shall no longer apply.

(C) At least 30 days in advance of the closing date specified in any contract for sale, Blue Chip shall supply plaintiff with the name of the proposed purchaser, the purchase contract, and with such other information in its

possession as is material to the proposed sale. If plaintiff requests, the said closing date shall be extended to the extent necessary to afford plaintiff 60 days between the date of the receipt of the said information and the closing date. Blue Chip may close any sale unless plaintiff serves upon Blue Chip, at least 15 days in advance of the closing date, written notice that plaintiff objects thereto. If plaintiff serves such written notice with respect to a sale to a purchaser engaged in the trading stamp business, or a purchaser engaged in the operation of retail food stores in the State of California, such sale shall not be closed. If plaintiff serves such written notice with respect to any other sale, the sale shall not be closed unless approved by the Court. The time period set forth in Section VI(A) above shall be tolled during the pendency of any extension or of any proceeding under this Section VI(C).

(D). The divestiture ordered and directed by Section VI(A) of this Final Judgement shall be made in good faith and shall be absolute and unqualified except as follows:

(1) Nothing herein contained shall be deemed to prohibit Blue Chip from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust or any other form of security reasonably necessary to secure full payment of the price at which the divested property is disposed of or sold or to secure any other obligation of a purchaser or successor, provided that if Blue Chip shall regain ownership of or control over the property divested as a result of any lien, mortgage, deed of trust, or other undertaking, Blue Chip shall be required to terminate such ownership or control within 18 months thereafter.

(2) In the event that Blue Chip receives, as a result of any divestiture hereunder, stock of a corporation which controls the divested assets:

(a) Blue Chip shall be required: (i) to dispose of any amount of such stock in excess of 10% of the outstanding common stock of such corporation within one year following the date of receipt thereof or within 22 months following the date Section V shall no longer apply, whichever is earlier, provided that in no event shall such disposal be required within less than three months following the date of receipt of such excess; and (ii) to dispose of the balance of such stock no later than the date of final distribution in liquidation; and (iii) pending disposal, to cause any voting rights of such stock to be exercised by a financial institution or other third party who is acceptable to plaintiff or approved by the Court; and

(b) In the event Blue Chip distributes such stock to its shareholders, no distribution shall be made pursuant to which any Blue Chip shareholder will retain more than 1% of the outstanding common stock of the said corporation unless the plan of distribution is acceptable to plaintiff or approved by the Court.

VII.

In the event that Section V becomes inapplicable, Blue Chip may also enter into a reorganization pursuant to a plan for the reorganization of Blue Chip Stamp Company acceptable to the Court. The plan shall be substantially in accordance with either of the plans heretofore furnished to plaintiff or in accordance with any other plan acceptable to Blue Chip and to plaintiff.

VIII.

(A) Blue Chip is ordered and directed to continue its trading stamp business and to continue to promote its trad-

ing stamp service until completion of the reorganization set forth in Sections V or VII above or until the divestiture set forth in Section VI above. Until such reorganization or divestiture Blue Chip is enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using Blue Chip's stamp service; (ii) the rate of issue employed by such person in offering Blue Chip's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person: (i) to limit the rate of issue employed in offering Blue Chip's or any other person's stamps; or (ii) to refrain from using any other trading stamp service.

(B) New Blue Chip, in the event that it is not already a party hereto, shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. A purchaser of assets pursuant to Section IX hereof shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. New Blue Chip and such purchaser are enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using the company's stamp service; (ii) the rate of issue employed by such person in offering the company's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person (i) to limit the rate of issue employed in offering the company's

or any other person's stamps; or (ii) to refrain from using any other trading stamp service;

(3) Having as an officer or employee any person who, while holding such position, also serves as an officer, director, or employee of any person using trading stamp services; or from having, for a period of ten years following the date of entry of this Final Judgment, as a director, any person who, while holding such position, also serves as an officer, director or employee of any person who was a Blue Chip stockholder in 1956 or 1957.

(C) Each of the retailer defendants is enjoined and restrained for a period of ten years following the date of entry of this Final Judgment:

(1) From having as an officer, director, or employee any person who, while holding such position, also serves as an officer, director or employee of New Blue Chip; or

(2) From exercising any right which it might acquire to vote for the election of any official of New Blue Chip; *provided* that a retailer defendant may cause such right to be exercised independently by a financial institution or other third party acceptable to plaintiff or approved by the Court.

Each retailer defendant shall be free to utilize or not utilize the trading stamp services of Blue Chip and New Blue Chip and, except as provided in this Section VIII(C), to exercise the same rights and privileges available to every other user of the stamp services of Blue Chip or New Blue Chip.

IX.

New Blue Chip shall, within 30 months after the date of completion of the reorganization under Sections V or VII above or the divestiture under Section VI above present

for the approval of the Court a plan which shall include the following terms:

(1) New Blue Chip shall offer for sale one-third of its then existing trading stamp business in the State of California. The business to be offered for sale shall be located within a contiguous geographic area within Southern California.

(2) A purchaser shall be permitted to acquire the business only upon the condition that it enter its appearance in this proceeding and agree: (i) to be bound by the applicable provisions of Sections VIII(B), IX, X and XI of this Final Judgment and (ii) to engage in the trading stamp business for a reasonable period of time. A purchaser shall have the right, if it so elects, to redeem New Blue Chip trading stamps within the contiguous area for the period of one year following the consummation of the sale. Plaintiff shall have the right to object to a purchaser in the same manner as it may object to a purchaser under Section VI(C) above.

(3) New Blue Chip shall not, during the period of one year following the consummation of the sale: (i) knowingly allow any person operating retail establishments in the contiguous area to issue New Blue Chip stamps to customers of such establishments; or (ii) furnish New Blue Chip stamps to any person with knowledge that the stamps will be issued to customers at any retail establishment in the contiguous area; or (iii) otherwise engage in the trading stamp business in the contiguous area except that, if the purchaser does not elect to redeem New Blue Chip stamps or if the purchaser fails to perform in accordance with his redemption obligations, New Blue Chip shall have the right to redeem its outstanding stamps in said area.

Following the said one year period, New Blue Chip shall offer its trading stamp service in the contiguous area.

X.

For the purpose of securing compliance with this Judgment and for no other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, New Blue Chip, or any purchaser under Section IX hereof, made to its principal office, and subject to any legally recognized privilege, be permitted:

(1) Access during the office hours to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of any person specified in this Section X(A) related to any matters contained in this Judgment;

(2) Subject to the reasonable convenience of, and without restraint or interference from, any person specified in this Section X(A), to interview officers or employees of any such person who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, any defendant, New Blue Chip or a purchaser under Section IX shall submit such additional reports in writing with respect to the matters contained in this Final Judgment as may be requested. Provided that no information obtained by the means provided for in this Section X shall

be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for construction, carrying out, modification, termination or enforcement of or compliance with the provisions of this Final Judgment and for the punishment of violations thereof.

Dated: June 5, 1967

/s/ WARREN J. FERGUSON
United States District Judge

Lodged—Apr 28 1967
Clerk, U. S. District Court
Central District of California

United States District Court
Central District of California

Civil No. 63-1552-F

United States of America,
Plaintiff,

v.

Blue Chip Stamp Company; Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants

COPY OF OUTLINES OF ALTERNATIVE REORGANIZATION PLANS AND COPY OF LETTERS WITH RESPECT THERETO TO BE LODGED WITH PROPOSED FINAL JUDGMENT

In the negotiations between plaintiff and defendants for a consent decree, alternative plans for a possible reorganization of Blue Chip Stamp Company were discussed and, as noted in Section V of the proposed Final Judgment lodged this date, outlines of such plans were furnished to plaintiff. Copies of such outlines are attached hereto with numbers and dollar amounts of the proposed shares of stock and debentures left blank for the reasons stated in the attached letter to the Director of Operations, Antitrust Division, Department of Justice.

Also attached is a copy of a letter dated April 19, 1967 from the attorney for Blue Chip Stamp Company to the Director of Operations, Antitrust Division, Department of Justice, with respect to operations of the company reorganized or organized pursuant to either of said plans "A" or "B".

Dated: April 28, 1967.

For the Plaintiff:

Donald F. Turner
Assistant Attorney General

Gordon B. Spivack
Stanley E. Disney

Lawrence W. Somerville
Attorneys, Department of Justice

For the Defendants:
O'Melveny & Myers
William W. Alsup
Allyn O. Kreps
and
Wilmer, Cutler & Pickering
Arnold M. Lerman

By William W. Alsup
By Arnold M. Lerman
Attorneys for Defendant Blue Chip Stamp Company

O'Melveny & Myers
William W. Alsup
Allyn O. Kreps

By William W. Alsup
Attorneys for Defendants Von's

Gorcery Co., Alexander's Markets, Ralphs Grocery Company, and Thrifty Drug Stores Co. Inc.
DONAHUE, RICHARDS & GALLAGHER
JOSEPH A. WOODS, JR.
and
O'MELVENY & MYERS
WILLIAM W. ALSUP
ALLYN O. KREPS

By Joseph A. Woods, Jr.
Attorneys for Defendant Lucky Stores, Inc.

PILLSBURY, MADISON & SUTRO
WILLIAM E. MUSSMAN
DAVID T. STEFFEN
and
O'MELVENY & MYERS
WILLIAM W. ALSUP
ALLYN O. KREPS

By David T. Steffen
Attorneys for Defendant Safeway Stores, Incorporated

THELEN, MARRIN, JOHNSON & BRIDGES
GORDON JOHNSON
CHESTER H. BRANDON

By Chester H. Brandon
Attorneys for Defendant Purity Stores, Inc.

McCutchen, Black, Verleger & Shea
G. Richard Doty

By G. Richard Doty
Attorneys for Defendant Market Basket

Tinning & DeLap
James E. Cox
and
William J. Currer, Jr.

By James E. Cox
Attorneys for Defendant Thriftimart, Inc.

REORGANIZATION PLAN "A" FOR BLUE CHIP STAMP COMPANY

1. Amend by-laws, if necessary, to eliminate any restriction on transferability of shares.

2. Amend Articles of Incorporation to change authorized capital to number of common shares, $1.00 par value, necessary to effect the reorganization described below.

3. Subject to Permit of Commissioner of Corporations of the State of California and to a Registration Statement becoming effective under the Securities Act of 1933:

(a) Reclassify present outstanding Class A and Class B shares into ..... common shares.

(b) Offer to sell, in units of one common share and one $..... ten-year debenture (hereinafter described), an aggregate of ..... units as follows:

(i) ..... units to users since March 1, 1964, of Blue Chip Stamp Company's trading stamp services (other than holders of Class A or Class B shares) at a price of $..... per unit, the right of users to subscribe to be substantially in proportion to annual stamp pad patronage; provided that all such users would have the right to undersubscribe or oversubscribe, subject to allocation in the event of oversubscription.

(ii) ..... units to the public through a firm underwriting at not less than $..... per unit plus underwriting commission. In addition, the underwriter will undertake to underwrite the sale of all units not purchased in the offering under paragraph 3(b)(i).

(c) Offer to sell to the management of Blue Chip Stamp Company ..... common shares at $1.00 per share and reserve for future issuance, to manage-

ment of Blue Chip Stamp Company ..... common shares under a stock option plan at a price related to market value so that the available management shares will total ..... shares.

Thus the percentages of stock eventually will be 45% to present shareholders, 45% to users and the public, 10% to management.

4. The $.....2..... debentures shall:

(a) Be subordinated to claims or causes of action, including, without limitation, claims under the antitrust laws, against Blue Chip and its past and present officers, directors and stockholders relating to Blue Chip operations prior to the date the consent judgment becomes final and not subject to appeal, or arising from the reorganization.

(b) Bear interest at 6% (or at ½% above prime rate, whichever is higher) payable quarterly.

(c) Subject to 4(a) above, be payable ten years after date of issuance, be subject to prepayment in whole or in part six years after date of issuance, and, commencing six years after date of issuance, be subject to the annual retirement of one-fifth of the total amount of the debentures by purchase or redemption through the operation of a sinking fund.

5. For a period of ten years, none of the retailer defendants shall be eligible, directly or indirectly, to acquire any additional common shares.

6. Upon completion of the reorganization and the exchange of shares contemplated under paragraph 3(a):

(a) Each of the retailer defendants receiving any of the ..... common shares to be issued in said exchange shall deposit for a ten-year period the cer-

tificates representing such shares in separate trusts with full voting power vested in separate trustees satisfactory to plaintiff or the Court. Each owner of such common shares shall have the right to sell or otherwise dispose of and transfer any or all of the shares deposited by it in trust and in the event of such sale or disposition the certificates representing the shares sold shall be released from the trust with full voting rights vested in the new owner of such shares, provided such release from the trust shall not occur if the sale or disposition is to an officer, director or a shareholder holding more than 5% of the outstanding stock of any retailer defendant.

(b) The directors of Blue Chip Stamp Company, other than Donald A. Koeppel, shall resign as such directors and shall be replaced by Messrs.

....., ...,
....., ...,
....., ...,
....., ...,
and .....

7. Purchasers of the units under paragraph 3(b) shall be free to transfer either debentures or common shares, independent of the transfer of the other.

8. There shall be no requirement that a user of the trading stamp services of Blue Chip Stamp Company be a stockholder, or that a stockholder be a user.

9. There shall be appropriate provisions to prevent dissipation of, and to maintain liquidity of, present and future assets.

10. The reorganized company shall be obligated to engage in the trading stamp business in California for a reasonable period of time.

REORGANIZATION PLAN "B" FOR BLUE CHIP STAMP COMPANY

1. A new California corporation will be organized with a capital structure of one class of common stock sufficient to accomplish the distribution of the amount of stock contemplated in Reorganization Plan "A". A nominal number of shares will be initially issued to present Blue Chip Stamp Company for cash.

2. Present Blue Chip will be merged into the new corporation in accordance with California law and pursuant to an agreement of merger which will provide that:

(a) The name of the new corporation as the surviving corporation of the merger will be Blue Chip Stamp Company or another name using "Blue Chip."

(b) Subject to Permit of the Commissioner of Corporations of the State of California and to a Registration Statement for the new corporation becoming effective under the Securities Act of 1933, the new corporation will issue its stock and debentures to present Blue Chip stockholders,* non-stockholder users and the public, and to management in the amounts contemplated in Reorganization Plan "A".

(c) The debentures to be issued shall be issued in accordance with the description in paragraph 4 of Reorganization Plan "A".

(d) The new corporation will, expressly and by operation of law under the California statutes gov-

---

*Present stockholders of Blue Chip under California law will have a right to dissent from the merger and to receive the fair market value of their stock in lieu of stock of the new corporation. To the extent, if any, that this election is exercised, it would reduce the number of shares of the new company to be issued to present Blue Chip shareholders.

erning statutory mergers, acquire all the assets and, in consideration for such transfer of assets, assume all liabilities of the present company arising out of its operations prior to the date the Consent Judgment becomes final and not subject to appeal, including, without limitation, those existing by virtue of antitrust claims asserted against the present company, its past and present officers, directors and stockholders, and liabilities of the present company, its officers, directors and stockholders arising from the reorganization.

(e) The rights, restrictions and provisions set forth in paragraphs 5 through 10 of Reorganization Plan "A" shall be applicable to the new corporation.

Law Offices of

O'MELVENY & MYERS [Letterhead]

433 South Spring Street — Los Angeles, California 90013
Telephone 620-1120 — Cable Address "MOMS"

April 19, 1967

Re: *United States v. Blue Chip Stamp Company*

Dear Mr. Spivack:

You asked that we confirm the statement to you that it is contemplated that the Blue Chip Stamp Company reorganized or organized pursuant to Plan "A" or "B" will operate for profit for the benefit of its stockholders and not as a cooperative. This is to confirm that statement and to advise you that the registration statement pursuant to which the stock and debentures of the reorganized or newly organized corporation will be issued will explicitly

state it is not intended that profits of the corporation will be rebated to users.

Very truly yours,

William W. Alsup

Gordon B. Spivack, Esq.
Director of Field Operations
Antitrust Division
Department of Justice
Washington, D. C.

Law Offices of

O'MELVENY & MYERS [Letterhead]

433 South Spring Street — Los Angeles, California 90013
Telephone 620-1120 — Cable Address "MOMS"

April 27th, 1967

Gordon B. Spivack, Esq.
Director of Field Operations
Antitrust Division
Department of Justice
Washington, D. C. 20530

Re *United States v. Blue Chip Stamp Company, et al.*

Dear Mr. Spivack:

In our negotiations with you and your staff for a consent decree in the above matter we submitted alternative outlines of plans of reorganization "A" and "B" which had been approved by defendants, the Assistant Attorney General of California and the attorney for Certified Grocers and California Grocers Association.

We do not desire to file as a public document copies of said plans "A" or "B" which specify numbers, dollar amounts or price of the stock and debentures as this

might cause problems for the Company with the California Corporations Commissioner and the Securities and Exchange Commission. Moreover, it is possible that the numbers of shares of the common stock will be increased and the face amount of the debentures will be reduced so as to achieve a wider subscription and to increase the likelihood of alienability of the securities. For these reasons you have agreed with us that the copies of plans "A" and "B" to be lodged with the Court shall not disclose numbers or dollar amounts.

This letter is to assure you that no change will be made in the numbers of or face amounts of the securities which would have the effect of increasing the cost of the common stock to be issued, or of reducing the number of shares thereof to be issued, or of increasing the face amount of the debentures.

It is understood, of course, that in response to questions, requests or otherwise you may feel called upon to, and you are entirely free in your discretion to, disclose the numbers and dollar amounts which are set forth in plans "A" and "B" heretofore submitted to you.

Sincerely yours,

/s/ William W. Alsup

William W. Alsup

WWA:MPE

Appendix D

Final Judgment Lodged with Court on October 28, 1966

United States District Court
Central District of California

Civil No. 63-1552-IH
First Decree

United States of America,
Plaintiff,

vs.

Blue Chip Stamp Company, Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralphs Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.,
Defendants.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint in the United States District Court for the Southern District of California, Central Division, on December 26, 1963; each of the defendants having appeared and filed its answer denying the substantive allegations thereof; and the plaintiff and the consenting defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, without the taking of any evidence, and without this Final Judgment constituting any evidence or admission by any party in respect to any issue of fact or law herein;

Now, THEREFORE, It is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims upon which relief may be granted against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act.

II.

For the purposes of this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, association, corporation or other legal or business entity;

(B) "Trading stamp business" shall mean the distribution, for compensation, of trading stamps to any person for issuance to its customers, employees or others, and the redemption of said stamps for merchandise or money;

(C) "Trading Stamp Company" shall mean a person engaged in the trading stamp business;

(D) "Closing date" shall mean March 1, 1969;

(E) "Test period" shall mean the period between the date of entry of this Final Judgment and June 30, 1970.

III.

The provisions of this Final Judgment applicable to any defendant consenting and any person agreeing to be bound shall also apply to each of its subsidiaries, successors, assigns, officers, directors, and employees, and to all other persons in active concert or participation with such defendant or persons who shall have received actual notice

of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between or among such defendant or person and its officers, directors, employees, parent company, subsidiaries and affiliates, or any of them.

IV.

Each of the consenting retailer defendants is enjoined and restrained from:

(A) Combining or conspiring to restrain trade in, or monopolizing or attempting to monopolize the trading stamp business in the State of California; or carrying out, directly or indirectly, any such combination, conspiracy, attempt to monopolize or monopolization;

(B) Entering into any contract, agreement or understanding with any other user of trading stamps in the same line of business:

(i) To refrain, in the State of California or in particular areas thereof, from using trading stamp services entirely or from using the trading stamp services of any particular person or persons; or

(ii) To limit the rate of issue employed in distributing trading stamps to their respective customers in such state;

(C) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company to operate in the State of California;

Provided, that this Section IV shall not apply to a consenting retailer defendant, acting independently: (i) in obtaining or entering into any contract to obtain trading stamp services from any trading stamp company; or (ii) when such defendant is engaged in the trading stamp business

(either directly or through a subsidiary or affiliate), in furnishing or entering into any contract to furnish trading stamp services to any person, and provided further that this Section IV shall not apply to the provision of trading stamp services by any trading stamp company which is neither named as a defendant herein nor organized pursuant to the terms of this Final Judgment.

V.

(A) Blue Chip is ordered and directed to cause the creation of a new trading stamp company (hereinafter called "New Company") in accordance with Articles of Incorporation which have heretofore been furnished to plaintiff, or in accordance with any other Articles of Incorporation not inconsistent with the terms of this Final Judgment which Articles will provide for operation as a non-profit company or will be acceptable to the plaintiff, and to prepare and require New Company to engage in the trading stamp business in California and Nevada by the closing date. The preparation required shall include:

1. Commencing March 1, 1968 and until March 1, 1969, Blue Chip shall allow Directors of New Company to attend meetings of the Blue Chip Board of Directors.

2. Blue Chip and New Company shall enter into a contract on mutually satisfactory terms whereby beginning by the closing date, New Company shall redeem (on reasonable redemption terms satisfactory to Blue Chip) outstanding trading stamps issued by Blue Chip and shall maintain sufficient goods, personnel and facilities to carry out such redemption, with Blue Chip to compensate New Company for the goods delivered or cash paid in redemption and for services rendered;

3. By the closing date, Blue Chip shall transfer to New Company such tangible and intangible assets as may be appropriate for New Company to operate Blue Chip's trading stamp business on an economically viable basis; provided, however, that Blue Chip shall not be required to transfer any cash, securities or other liquid assets except to lend to New Company up to such amount, not exceeding $1,500,000.00, as may be required to provide New Company with reasonable working capital necessary for its operations for six months following the closing date.

4. Blue Chip shall furnish the plaintiff and New Company a schedule listing by category the proposed assets to be transferred to New Company. For a period of sixty days thereafter plaintiff and New Company may apply to this Court for a determination of whether the proposed transfer complies with Subsection 3 above and, in the event such application is filed, the said transfer shall not become effective except as approved by this Court;

(B) Blue Chip is ordered to cause New Company to enter its appearance in this proceeding and its written consent to be bound by the applicable provisions of this Final Judgment. New Company shall:

1. Reimburse Blue Chip for the out-of-pocket expenses directly incurred by Blue Chip in establishing New Company and transferring property to it;

2. Accept and pay for, on mutually satisfactory terms (including provisions for the discharge of continuing obligations from the date of transfer forward) the assets, including any cash amount, transferred to it by Blue Chip. If the parties cannot agree upon terms, the issues shall be resolved by arbitration under the rules of the American Arbitration Association but if the dispute involves the price for any asset, the arbitrator shall be a duly qualified ap-

praiser. Any mortgages, guarantees or other undertakings received by any defendant as security for the performance of the obligations of New Company shall not be utilized by any defendant to regain on a permanent basis the ownership of or control over New Company.

VI.

(A) Blue Chip is ordered and directed to issue a trading stamp and to promote a trading stamp service until the closing date; to cease issuing trading stamps on the closing date, and, within two years following the closing date, to terminate all of its trading stamp business. Thereafter, Blue Chip shall wind up its affairs expeditiously and be dissolved.

(B) Until the closing date Blue Chip and the consenting retailer defendants may continue the operation of Blue Chip, provided that Blue Chip is enjoined and restrained from:

1. Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using Blue Chip's stamp service; (ii) the rate of issue employed by such person in offering Blue Chip's for any other person's stamps; or (iii) the use by such person of any other trading stamp service;

2. Coercing or compelling any person: (i) to limit the rate of issue employed in offering Blue Chip's or any other person's stamps; or (ii) to refrain from using any other trading stamp service;

3. Using the name "Blue Chip" on any trading stamps issued by Blue Chip after March 1, 1968, or using the name

"Blue Chip" in any manner on any publication issued after June 1, 1968, to promote or merchandise trading stamp services, except for the purposes of redeeming Blue Chip stamps.

VII.

(A) New Company is enjoined and restrained:

1. From refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of an establishment operated by another person using the company's stamp service; (ii) the rate of issue employed by such person in offering the company's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

2. From coercing or compelling any person (i) to limit the rate of issue employed in offering the company's or any other person's stamps; or (ii) to refrain from using any other trading stamp service;

3. From having as an officer or employee any person who, while holding such position, also serves as an officer, director, or employee of any person using trading stamp services; or from having, for a period of ten years following the closing date, as a director, any person who, while holding such position, also serves as an officer, director or employee of any person who was a Blue Chip stockholder in 1956 or 1957;

4. From using the name "Blue Chip," except for the purposes of redeeming Blue Chip stamps contemplated by Section V(A)2. hereof; or

5. From refusing to furnish quartely, to a user of its trading stamp service, upon request of such user, a balance sheet, a profit and loss statement (including the company's

redemption rate), and a condensed analysis of its investment portfolio.

(B) Each of the consenting retailer defendants is enjoined and restrained for a period of ten years following the closing date:

1. From having as an officer, director, or employee any person who, while holding such position, also serves as an officer, director, or employee of New Company; or

2. From exercising any right which it might acquire to vote for the election of any official of New Company; *provided* that a consenting retailer defendant may cause such right to be exercised by a financial institution or other independent third party who is acceptable to plaintiff or approved by the Court.

Each consenting retailer defendant shall be free to utilize or not utilize the trading stamp services of New Company and, except as provided in this Subsection VII(B), to exercise the same rights and privileges available to every other participant in, or user of the stamp services of, New Company.

VIII.

(A) Plaintiff may, at any time within three months following the date upon which New Company shall have submitted a report of its distribution of stamps to retail food stores during the final three months of the test period, apply to the court upon notice and hearing for the further relief set forth in Section VIII(B) below with respect to the northern market area or the southern market area. Upon the showing by plaintiff that, for the nine-month period concluding the test period, New Company distributed for use in retail food stores in the northern market area or the southern market area trading stamps which

convert to 30% or more of the retail food store sales in that market area, the court shall issue the further relief with respect to such market area unless New Company then shows that there was, during the test period, some period of 12 consecutive months in which the sum of the trading stamps distributed for use in retail food stores in such market area by Blue Chip (for such portion of the period, if any, as Blue Chip distributed stamps) and New Company (for such portion of the period, if any, as New Company distributed stamps) converts to less than 30% of the retail food store sales in such market area.

(B) If the court finds, upon proof in accordance with Subsection (A) above, that further relief is warranted with respect to a market area, the court shall designate a one-year period (hereinafter the "relief period") to commence within three months of such finding, and shall order the following relief:

1. During the said relief period, New Company shall be enjoined and restrained from distributing its trading stamps to a person for use in such person's retail food stores or retail drug stores in such market area without first obtaining a written statement: that the person shall not, during the relief period, issue New Company's stamps in any such store in such market area in an amount in excess of that store's maximum quota (as defined below); that the person shall maintain records sufficient to verify compliance with said quota limitation; and that the person shall permit plaintiff access to its records for the purpose of verification.

2. Beginning six months after the close of the said relief period New Company shall be enjoined and restrained, for a period of three years, from distributing its trading stamps for use in a particular retail food store or

retail drug store in such market area to any person to whom it distributed stamps for such use in such store during the relief period:

(a) Unless such person shall have furnished to New Company a statement from a Certified Public Accountant or a Public Accountant to the effect that the records of such person reflect that the issuance of New Company's stamps in such store in such market area during the relief period complied with the said maximum quota limitation; or

(b) Unless such person, upon application to the court (or to a master appointed by the court) filed within six months after the close of the said relief period with notice to New Company and plaintiff, shows that it has complied with the above maximum quota limitation in such store or that its failure to do so was a result of inadvertence, mistake or excusable neglect. During the pendency of any person's application hereunder, New Company may continue to distribute stamps to such person for use in such store.

In the case of a person operating two or more stores in a market area, the injunction provided for in this Subsection VIII(B)2. shall apply only to the distribution of stamps by New Company to such person for use in those stores in the market area with respect to which the requirements of Subsections (a) or (b) above have not been met.

3. New Company shall be further enjoined and restrained from the date the relief period begins until the close of the three-year period set forth in Subsection 2. above, from distributing its trading stamps to any person who, to the knowledge of New Company:

(a) Intentionally falsifies: (i) the data supplied to a Certified Public Accountant or a Public Accountant

for use in the preparation of a statement pursuant to Subsection VIII(B)2.(a) hereof; or (ii) any representation made to New Company to cause New Company to distribute trading stamps to it; or

(b) Refuses to supply, upon specific request of New Company, for computations by New Company hereunder, data showing the amount of New Company stamps such person acquired for use in retail food stores or retail drug stores in a market area for a particular period or periods; or refuses to afford upon specific request of plaintiff, access to records in accordance with the representation made pursuant to Subsection VIII(B)1. hereof; or

(c) Acquires New Company's stamps and transfers them to a former customer of New Company with whom New Company is enjoined from dealing; or

(d) Issues New Company's stamps: (i) during the relief period, intentionally in excess of maximum quota limitations pursuant to a plan or design to exceed such quota limitations; or (ii) beginning six months after the close of the relief period, intentionally in a store to which the maximum quota limitation applied and with respect to which the requirements of Subsection VIII(B)2.(a) or (b) have not been met.

4. Nothing contained in Subsections VIII(B)1. and 2. shall apply to any distribution of trading stamps by New Company: to a person for use for any purpose other than issuance by a retail drug or food store in a market area in which further relief is applied; or to a person who, during the said relief period, acquires not more than 1040 pads of trading stamps for use in retail food stores in such market area or not more than 312 pads of trading stamps for use in retail drug stores in such market area.

5. For the purposes of this Section VIII New Company shall be entitled to rely in good faith upon a person's representations as to the number of pads used or to be used by such person within or outside a market area or within or outside a particular store or stores.

(C) For purposes of this Section VIII the following terms shall have the following meanings:

1. The "northern market area" shall be the California counties north of the line formed by the northern boundaries of San Luis Obispo, Kern and San Bernardino Counties; and the "southern market area" shall be the remaining California counties.

2. "Retail food store sales" in a market area shall be the sum of the sales reported in the "Annual Survey of Buying Power, Sales Management, the Magazine of Marketing" as retail food store sales for each county in such market area adjusted in the following manner:

(a) From the data in the "Annual Survey" there shall be computed, as set forth below, an average month's sales for each relevant calendar year. An average month's sales for any calendar year for which data is reported in the "Annual Survey," shall be 1/12th of the total calendar year sales so reported. An average month's sales for the calendar year following the last calendar year for which data is available shall be computed by multiplying the average month's sales for the last reported year by a fraction whose numerator shall be the average month's sales for the last reported year and whose denominator shall be the average month's sales for the reported year preceding.

(b) The amount of retail food store sales during any relevant time period hereunder shall be the sum of: (1) the number of months within such relevant time period which fall within a single calendar year times the average month's sales for the said calendar year; and (2) the number of months within such time period which fall within any other calendar year times the average month's sales for such other calendar year.

3. The "conversion" of trading stamps to retail food store sales or of retail food store sales to trading stamps shall be at the rate of 5,000 stamps (comparable to the present smallest denomination Blue Chip stamp) or the equivalent thereof, to each $500 of sales; and a "pad" of stamps shall be 5,000 such trading stamps or the equivalent thereof.

4. The "maximum quota" of a store shall be the amount of trading stamps which converts to a percentage of the gross dollar sales volume of such store during the relief period, which percentage shall be computed and announced by New Company. The percentage shall be determined by the ratio, during the last year of the test period, of stamps which convert to 30% of retail food store sales in the market area to 95% of the stamps distributed by New Company for use in retail food stores in the market area to persons using more than 1040 pads in the market area in such stores; provided that, in no event shall the percentage be less than 65%; and provided further that New Company may, from time to time, announce an increase in the percentage after 10 days' notice to plaintiff:

(a) Whether or not plaintiff objects, so long as, during the relief period, 95% of the stamps distributed by New Company for use in retail food stores in a market area to persons using more than 1040 pads in the market area in such stores will convert to not more than 30% of the retail food store sales in such area; or

(b) If plaintiff does not object thereto within the said 10-day period, and such increase is based upon a good faith estimate by New Compay that 95% of the stamps to be distributed: (i) in the relief period or (ii) in any one year period beginning some time in the relief period, for use in retail food stores in a market

area to persons using more than 1040 pads in the market area in such stores will convert to not more than 30% of the retail food store sales in such area.

Any increase, once announced, shall not thereafter be reduced.

5. The measurement hereunder of any percentage for any 9-month or 12-month period shall be based upon the percentage for the entire said period and not the percentage for any particular month.

6. All retail food stores or all retail drug stores under common ownership or control of any person shall be deemed to be the retail food stores or retail drug stores of such person.

IX.

For the purpose of securing compliance with this Judgment and for no other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any consenting defendant or New Company made to its principal office, and subject to any legally recognized privilege, be permitted:

1. Access during the office hours of any consenting defendant or New Company to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of any consenting defendant or New Company related to any matters contained in this Judgment;

2. Subject to the reasonable convenience of any consenting defendant or New Company and without restraint or interference from it, to interview officers or employees of

any consenting defendant or New Company who may have counsel present, regarding any such matters.

(B) Following the close of each fiscal quarter during the test period, Blue Chip and New Company shall each submit reports to the Department of Justice with respect to the quantity of stamps distributed by such company to its customers for use in retail food stores in the respective market areas defined in Section VIII. Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, any consenting defendant or New Company shall submit such additional reports in writing with respect to the matters contained in this Final Jugment, as may be requested. Provided that no information obtained by the means provided for in this entire Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for construction, carrying out, modification, termination or enforcement of or compliance with the provisions of this Final Judgment and for the punishment of violations thereof.

Dated: ....., 1966.

United States District Judge

Appendix E

Sections 1, 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 2, 4, provide in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> * * * * * * *
>
> SEC. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; * * *.

Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29, provides as follows:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. App. following § 2718, provides as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional

right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 59(e) of the Federal Rules of Civil Procedure 28 U.S.C. App. following § 2718 provides:

> "(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948."

SUPREME COURT, U. S. Nos. 820, 849

FILED
JAN 2 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

THRIFTY SHOPPERS SCRIP CO.,

Appellant,

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ALEXANDER'S MARKETS, LUCKY STORES, INC., MARKET BASKET, PURITY STORES, INC., RALPHS GROCERY COMPANY, SAFEWAY STORES, INCORPORATED, THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., and VON'S GROCERY CO.,

Appellees.

WILLIAM TWYMAN, dba BILL'S UNION STATION, *et al.*,

Appellants and Petitioners for Intervention,

v.

UNITED STATES OF AMERICA; BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,

Appellees.

On Appeal from the United States District Court for the Central District of California

Motion of Appellees Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc., Thrifty Drug Stores Co., Inc., and Von's Grocery Co. to Dismiss or Affirm.

O'MELVENY & MYERS
WILMER, CUTLER & PICKERING
and
DONAHUE, RICHARDS & GALLAGHER
PILLSBURY, MADISON & SUTRO
THELEN, MARRIN, JOHNSON & BRIDGES
TINNING & DE LAP
BAKER, ANCEL & REDMOND
McCUTCHEN, BLACK, VERLEGER & SHEA

Of Counsel.

WILLIAM W. ALSUP
ALLYN O. KREPS
THOMAS J. READY
433 South Spring Street
Los Angeles, California 90013
and
ARNOLD M. LERMAN
900 - 17th Street N.W.
Washington, D. C. 20006

Attorneys for Appellee Blue Chip Stamp Company

(Continued Inside Front Cover)

Jeffries Banknote Company, Los Angeles — 746-1611

(Continued From Front Cover)

WILLIAM W. ALSUP
ALLYN O. KREPS
THOMAS J. READY
433 South Spring Street
Los Angeles, California 90013
Attorneys for Appellees Alexander's Markets, Ralphs Grocery Company, Thrifty Drug Stores Co., Inc., and Von's Grocery Co.

JOSEPH A. WOODS, JR.
Central Building
14th and Broadway
Oakland, California 94612

and

WILLIAM W. ALSUP
ALLYN O. KREPS
THOMAS J. READY
433 South Spring Street
Los Angeles, California 90013
Attorneys for Appellee Lucky Stores, Inc.

WILLIAM E. MUSSMAN
DAVID T. STEFFEN
225 Bush Street
San Francisco,
California 94104

and

WILLIAM W. ALSUP
ALLYN O. KREPS
THOMAS J. READY
433 South Spring Street
Los Angeles, California 90013
Attorneys for Appellee Safeway Stores, Incorporated

GORDON JOHNSON
CHESTER H. BRANDON
111 Sutter Street
San Francisco,
California 94104
Attorneys for Appellee Purity Stores, Inc.

JAMES E. COX
Court and Mellus Streets
Martinez, California 94554

and

MARK G. ANCEL
Room 700
626 Wilshire Boulevard
Los Angeles, California 90017

and

WILLIAM J. CURRER, JR.
Room 939
548 South Spring Street
Los Angeles, California 90013
Attorneys for Appellee Thriftimart, Inc.

G. RICHARD DOTY
615 South Flower Street
Los Angeles, California 90017
Attorney for Appellee Market Basket

TOPICAL INDEX

	Page
Statement	2
1. Nature of the case	2
2. The proceedings below	4
3. Description of appellants	7
a. Service station operators	7
b. Thrifty Shoppers	8
4. Decision of the District Court	9
5. Restatement of the Questions Presented	9
I The denial of the motions to intervene was proper	11
A. The decree is effective and appropriate	11
1. The decree dissipates the alleged restraints and alleged monopoly in trading stamps	11
2. The District Court insisted that any decree effectively dissipate the alleged monopoly; it considered all proposed alternatives	15
3. The decree also meets the standards of relief of the *Grinnell* case (384 U.S. 563) and the *Du Pont* case (366 U.S. 316)	21
B. Appellants had no right to intervene under Federal Rules of Civil Procedure 24(a) and the District Court properly exercised its discretion in denying intervention under Rule 24(b)	25
1. Appellants had no right to intervene	25
2. Neither the *El Paso* case (386 U.S. 129) nor the *Missouri-Kansas Pipe Line Co.* case (312 U.S. 502) supports appellants' claimed right to intervene	26
Conclusion	28

APPENDIX A Page

Order Denying Motions, United States of America v. Blue Chip Stamp Company, et al., Civil No. 63-1552-F, United States District Court, Central District of California..... 1a

APPENDIX B

Final Judgment, United States of America v. Blue Chip Stamp Company, et. al., Civil No. 63-1552-F United States District Court, Central District of California..... 5a

APPENDIX C

Opinion Denying Motions to Intervene and to Vacate Consent Decree, United States of America v. Blue Chip Stamp Company, et al., Civil No. 63-1552-F, United States District Court, Central District of California..... 19a

APPENDIX D

Reporter's Transcript of Proceedings, United States of America v. Blue Chip Stamp Company, et al., Civil No. 63-1552-F, United States District Court, Central District of California (Thursday, December 15, 1966)..... 39a

TABLE OF AUTHORITIES CITED

Cases	Page
Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137	26, 27
Besser Mfg. Co. v. United States, 343 U.S. 444	23
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129	26, 27
Continental Ins. Co. v. United States, 259 U.S. 156	27
Sam Fox Publishing Co. v. United States, 366 U.S. 683	26
International Salt Co. v. United States, 332 U.S. 392	23
Maryland and Virginia Milk Producers Assn., v. United States, 362 U.S. 458	24
Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502	26, 27
Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Company, et al., No. 67-596-F (C.D. Cal.)	8
Twyman, et al. v. Blue Chip Stamp Company, et al. Civil No. 66-1522-F (C.D. Cal.)	7
United States v. Aluminum Company of America, 41 F.R.D. 342 (E.D. Mo.), appeal dismissed per curiam sub nom. Lupton Mfg. Co. v. United States, 388 U.S. 457 (Docket No. 1296, October Term 1966)	26
United States v. Du Pont & Co., 366 U.S. 316	21, 22, 23, 27
United States v. Grinnell Corp., 384 U.S. 563	21, 22
United States v. National Linen Service Corp., 1956 CCH Trade Cases ¶68,398 (N.D. Ga.)	22

Page

United States v. United Fruit Co., 1958 CCH Trade Case ¶68,941 (E.D. La.) 22

United States v. Von's Grocery Co., 384 U.S. 270 .. 24

Statutes

Clayton Act Section 7 (15 U.S.C. §18) 22

Robinson-Patman Act (15 U.S.C. §13(a)) 7

Sherman Act (15 U.S.C. §§1 and 2)

Section 1 ..... 2, 3, 7

Section 2 ..... 2, 3, 7, 22

Rules

Federal Rules of Civil Procedure

Rule 6(b) 25

Rule 24(a) 25

Rule 24(a)(1) 25

Rule 24(b) 25

Rule 59(e) 25

Rules of the United States Supreme Court

Rule 16(1)(a) 1

Rule 16(1)(c) 1

Rule 16(1)(d) 1

IN THE

Supreme Court of the United States

October Term, 1967

Nos. 820, 849

THRIFTY SHOPPERS SCRIP CO.,

Appellant,

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ALEXANDER'S MARKETS, LUCKY STORES, INC., MARKET BASKET, PURITY STORES, INC., RALPHS GROCERY COMPANY, SAFEWAY STORES, INCORPORATED, THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., and VON'S GROCERY CO.,

Appellees.

WILLIAM TWYMAN, dba BILL'S UNION STATION, *et al.*,

Appellants and Petitioners for Intervention,

v.

UNITED STATES OF AMERICA; BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,

Appellees.

On Appeal from the United States District Court for the Central District of California

Motion of Appellees Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc., Thrifty Drug Stores Co., Inc., and Von's Grocery Co. to Dismiss or Affirm.

Pursuant to Rule 16(1)(a), (c) and (d) of the Rules of this Court, appellees (other than appellee United States, which is filing a separate motion) respectfully move that: (1) the appeals from the Order of the District Court denying Appellants' Motions to Intervene and to Vacate the Final Consent Judgment be dismissed, or alternatively, said Order be affirmed and (2) the pur-

ported appeals from the Judgment of the District Court entered June 5, 1967, be dismissed.

Appellees are authorized to advise the Court that the State of California, California Grocers Association and Certified Grocers of California, Ltd. approve and support this Motion.

STATEMENT

1. Nature of the Case.

These are appeals from an Order of the District Court of the United States for the Central District of California in a government civil antitrust case charging violations of Sections 1 and 2 of the Sherman Act. That Order of August 3, 1967, (App. A) denied the respective motions of appellants to intervene and to vacate the final judgment of the District Court entered on June 5, 1967, upon consent of all parties to the case. Appellants were heard fully as *amici curiae* prior to entry of the consent judgment (App. B) and filed their motions to intervene after the judgment was entered. These are also purported direct appeals by appellants from the final judgment, although none of the appellants was a party to the action.

The government antitrust action began in 1963 with the filing of a complaint against Blue Chip Stamp Company ("Blue Chip") and nine of its stockholders ("retailer defendants").* Blue Chip furnishes a non-franchise

---

* Eight retail grocery chains: Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc. and Von's Grocery Co.; and one retail drug chain: Thrifty Drug Stores Co. Inc. Contrary to the statement in the Complaint (R. 2, 11) and in one jurisdictional statement (J.S. No. 849, 5), Thrifty Drug Stores Co. Inc., while a present stockholder, was not an original incorporator of Blue Chip.

trading stamp service to thousands of retail merchants in California. The complaint alleged that the defendants had combined and conspired to restrain trade in and to monopolize the trading stamp business in California and that, through a series of allegedly illegal acts, Blue Chip had acquired a monopoly position, in violation of Sections 1 and 2 of the Sherman Act.

In early 1965, the parties began negotiations looking to a possible consent decree. Throughout the negotiations and court proceedings below, the Government insisted that Blue Chip's market position should be curtailed and additional trading stamp competition be generated. (Tr. Dec. 13, 1966, 52-53.) The negotiations were addressed to the way in which this might be accomplished, if possible, without unnecessary injury to the numerous retailers who had turned to Blue Chip as the only trading stamp company which offered its service to all merchants. (R. 2067-69.)

The State of California, speaking on behalf of merchants and in the public interest, participated in the negotiations and in the proceedings below. The State pointed out that a merchant's ability to offer a trading stamp competitive with that used by major retailers was essential to his survival. (R. 1558-1560, 1567, 1570-71, 1578-1588.) It noted that every trading stamp company except Blue Chip dealt on a franchise basis, furnishing its service to a select merchant and not to any of the merchant's competitors. (R. 2073-74, 2091-92, 2140-2182) Because the number of reliable franchise companies was limited, the State feared that smaller as well as many of the larger merchants would be left

without a competitive trading stamp if a viable non-franchise trading stamp company were not preserved. (R. 1578-1593) In the course of the negotiation, the Government also elicited the views of numerous other persons including trading stamp companies and retail merchants. (R. 1822, 1829; Tr. Dec. 13, 1966, 72-73)

After two and one half years of continuous negotiation, all parties, with the approval of California and others, reached agreement on the consent judgment (App. B) entered below. The judgment requires Blue Chip to reorganize, and to present a plan for divestiture of one-third of its trading stamp business. Blue Chip is compelled to continue to offer a non-exclusive service and its operations are placed under other injunctive limitations. The judgment also strips the retailer defendants of control over Blue Chip and places them under stringent prohibitions tailored to the specific acts alleged in the Complaint.

2. The Proceedings Below

The Government's complaint was filed in December 1963. After issue was joined, the Government and defendants engaged in extensive discovery and, commencing in 1965, intensive negotiations concerning a possible consent decree. On July 22, 1966, a proposed decree was lodged with the consent of all parties other than defendants Market Basket and Thriftimart, Inc:, who objected to the decree. The State of California, Certified Grocers of California, Ltd.* and California Grocers

* Certified Grocers of California, Ltd. ("Certified") is a co-operative wholesale grocery concern, consisting of over 2,000 retail grocer members, with approximately 3,000 stores. (R. 1494-95).

Association* (all non-parties) also objected to the decree, and the Government withdrew its consent. (Tr. Oct. 3, 1966, 4.)

Thereafter, California, Certified and CGA, as well as others, were given opportunity to express their views during further negotiations (R. 2067-69), and a second proposed consent decree was lodged on October 28, 1966. Again Market Basket and Thriftimart, Inc. objected to the decree, as did California, Certified, CGA, the Sperry and Hutchinson Company ("S & H")** and the appellant service station operators. Each of these non-parties sought and obtained leave to appear *amicus* and filed briefs in opposition to the decree.

The lodging of the second proposed decree received extensive publicity over radio, television and the press, and on December 13, 14 and 15, 1966, the District Court held a hearing on the decree, allowing all interested persons — whether a party or not — to be heard. All of the *amici* appeared and argued extensively. At the conclusion of the hearing, Judge Ferguson refused to sign the decree and outlined certain suggestions to assist all concerned in future negotiations. In the negotiations

---

* California Grocers Association ("CGA") is a statewide retail grocer trade association consisting of approximately 5,000 members, with 6,300 stores; (Tr. Dec. 14, 1966, 300-301).

** Sperry and Hutchinson Company, the largest trading stamp company in the country, is the proprietor of S & H Green Stamps (R. 2150-52). Until Blue Chip appeared as a substantial competitor, this company had dominated the California trading stamp market (R. 2091-94), although the great mass of California retailers were denied its stamp service because of its franchise system (R. 2093-94).

which followed all interested persons were again given full opportunity to participate.

On April 28, 1967, a third proposed decree was lodged. This decree was the first to which all defendants consented. The lodging of the decree again received extensive publicity and actual notice was given to all interested persons, including all prior *amici curiae*. The District Court established a schedule for submission of briefs and set argument for June 5, 1967.

The State of California actively supported entry of the decree, as did Certified and CGA. Three franchise trading stamp companies* appeared in opposition: S & H, Premium Service,** and the appellant in No. 820, Thrifty Shoppers. The appellant service station operators also opposed entry of the decree. Each of the objectors fully availed itself of the opportunity to submit briefs and to argue (R. 2486, 2500, 2504, 2522; Tr. June 5, 1967, 27-85). After oral argument, the court decided to enter the proposed decree. The judgment was entered on June 5, 1967.

On June 15, 1967, the appellant service station operators filed their motions to intervene and to vacate the judgment. The motions were accompanied by a complaint in intervention and a demand for jury trial on all issues in the government proceeding. On July 12, 1967, appellant Thrifty Shoppers filed similar motions. Briefs were submitted and oral argument was heard on July

---

* A fourth trading stamp company (King Korn) filed a letter opposing entry of the decree (R. 2532).

** Premium Service, a national trading stamp company, is the proprietor of Gold Bond Stamps.

31, 1967. At the conclusion of the argument the court denied the motions and a minute order was so entered.* The written order was entered on August 3, 1967, and a written opinion (App. C) was filed on August 18, 1967.

3. **Description of Appellants.**

a. **Service Station Operators**

Appellants "independent California service station operators" are present or former gasoline station operators who are plaintiffs in a private treble damage action against Blue Chip.** The action, now pending in the court below, seeks damages because of alleged violations of Sections 1 and 2 of the Sherman Act and because of alleged price discriminations under the Robinson-Patman Act. These appellants filed their damage action in February 1966 and first expressed interest in this proceeding in response to the lodging of the second proposed consent decree. Appellants appeared *amicus* and objected to entry of that decree because it allegedly would have impaired Blue Chip's ability to pay damages if appellants were able to prevail in their private litigation.***

These appellants also appeared *amicus* and objected to entry of the final judgment on June 5, 1967. At oral

---

* A third person, Raley's, Inc., a nondefendant Blue Chip stockholder, also filed a motion to intervene and to vacate the judgment, which motion was denied, but Raley's has abandoned its appeal.

** *Twyman, et. al. v. Blue Chip Stamp Company, et al.*, Civil No. 66-1522-F (C.D. Cal.)

*** "[T]he plaintiff service station operators would be left in the position of suing the hollow shell of a corporation . . . which will be left as the Blue Chip successor." (R. 2365, 2369)

argument, the Court urged their counsel to describe any way in which the decree could be improved and addressed the same question to the State of California. (Tr. June 5, 1967, 52-53, 86) Appellants offered no help to the Court and the State advised that it could see no way in which the decree would hurt the gasoline station operators. (Tr. June 5, 1967, 52-67, 86-87)

b. **Thrifty Shoppers.**

Thrifty Shoppers is a trading stamp company operating in Northern California (Tr. June 5, 1967, 49) and primarily in the San Francisco area. Unlike Blue Chip, it grants franchises to selected merchants and denies its stamp service to competitors of its licensees (Tr. July 31, 1967, 29; June 5, 1967, 44).

Thrifty Shoppers began operations prior to World War II. (Tr. June 5, 1967, 50) Blue Chip began its operations in Northern California in 1956. (R. 11; 2092) Eleven years later, more than three years after the Government action was filed, and more than two years after it had become widely known that consent decree negotiations were in progress, Thrifty Shoppers filed a private treble damage action against Blue Chip and the retailer defendants* and, shortly thereafter it sought leave to appear *amicus* in the consent decree proceedings. Counsel for Thrifty Shoppers was invited by the Court to suggest a

---

* *Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Co., et al.*, No. 67-596-F (C.D. Cal.). Thrifty Shoppers claims that Blue Chip caused it to lose business but that, of course, is yet to be established. It does not allege that it ever offered its trading stamp service to any defendant or any other major retailer.

more effective decree, but offered nothing constructive as an alternative (Tr. July 31, 1967, 29-34).

4. Decision of the District Court.

In his opinion (App. C) Judge Ferguson held that the motions to intervene and to vacate the judgment should be denied because (1) appellants had failed to make any showing at all as to any right which could be protected only by intervention, (2) the motions were not "timely" (3) appellants had not demonstrated the existence of any "interest relating to the property or transaction" sufficient to support their respective motions to intervene, (4) in any event appellants' motions were without merit, and (5) to grant such motions would unduly delay and prejudice the rights of the parties. These appeals followed.

5. Restatement of the Questions Presented.

Although appellants purport to set forth "significant" Questions Presented (J.S. No. 820, 2-3; No. 849, 3-4), their questions are neither accurate nor fair. These appeals present two limited questions:

1. After unanimous settlement of a protracted and complex Government antitrust action, do strangers to that action, who presented their views fully to the District Court, have the right to intervene after judgment, where their interests, if any, are being litigated in their own private treble damage actions against the defendants?

2. Where a final consent Judgment which was entered prior to the taking of any evidence:

(a) Provides for the breakup of an alleged monopoly position in California of a non-franchise trading stamp company by divestiture of one-third of its business to a new non-franchise trading stamp company and by the establishment of additional competitive opportunity for other trading stamp companies;

(b) Decrees the reorganization of the company by removing the nine retailer-stockholder-defendants from control thereof and provides for ownership by others of more than 55% of the stock; and

(c) Enjoins every practice which the complaint alleged to be illegal;

did the District Court abuse its discretion in entering that consent Judgment?

I.

THE DENIAL OF THE MOTIONS TO INTERVENE WAS PROPER.

A. The Decree Is Effective And Appropriate.

1. The Decree Dissipates The Alleged Restraints And Alleged Monopoly In Trading Stamps.

The decree (App. B, 5a-18a) specifically enjoins all the alleged illegal practices of the retailer defendant stockholders by forbidding them from:

> (a) Combining or conspiring to restrain trade or to monopolize or attempt to monopolize the trading stamp business in California (App. B, 7a);
>
> (b) Agreeing not to use or use stamps in a particular area, or not to use or use a particular stamp (App. B, 8a);
>
> (c) Agreeing to limit the rate of issue employed in distributing trading stamps to their respective customers (App. B, 8a); and
>
> (d) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company (App. B, 8a).

The decree specifically enjoins all of the alleged illegal practices of defendant Blue Chip by forbidding it from:

> (a) Refusing to provide stamps or imposing any limitation on such stamp use because of (i) the presence in the same locality of any other establishment using Blue Chip stamps, (ii) the rate of issue employed by such person in offering Blue Chip or any other stamp, or (iii) the use by such person of any other trading stamp service (App. B, 13a-14a);

(b) Coercing or compelling any person (i) to limit the rate of issue of Blue Chip stamps or any other stamp, or (ii) to refrain from using any other trading stamp service (App. B, 13a-14a).

Having enjoined all of the alleged illegal practices of both the retailer defendants and Blue Chip, the decree then provides that "bona fide and diligent efforts" (App. B, 9a) be made to dissipate the alleged monopoly in non-franchise trading stamps by a reorganization* of Blue Chip (App. B, 8a-9a) and submission of a plan to be approved by the Court for a divestiture of one-third of Blue Chip's business (App. B, 15a-17a).

Under the reorganization plan (R. 3321, 3325) the present shareholders of Blue Chip, both defendant and non-defendant, will divest themselves of over 55% of the stock of Blue Chip, and after divestiture no individual retailer will have more than 4½% of Blue Chip stock (R. 3321, 3324, 3326; Tr. June 5, 1967, 10). In addition to the above-mentioned horizontal provisions of the decree which prevent any concerted action by the defendant retailers, no defendant for ten years can vote its stock (App. B, 15a) nor have an officer, director or employee who also serves as an officer, director or employee of Blue Chip (App. B, 15a). The plan of reorganization as approved by Judge Ferguson permits establishment of an orderly market for stock of the

---

* There is also a provision (App. B, 9a) for certain Governmental action if such reorganization is not "bona fide and diligent", but there is no claim by appellants that the reorganization is not proceeding as rapidly as possible, subject to final disposition of the instant appeals from the denial of the motions to intervene and to set aside the consent decree.

reorganized company. The stock must be fully alienable, and an active market in the stock should result because the stock will be offered initially at a bargain price (R. 3220-21; 3328) and no stockholder need be a user of Blue Chip stamps and no user need be a stockholder (R. 3333).

The Government strongly asserted its view that these provisions effectively divest control of Blue Chip by the retailer defendants:

> "[By Mr. Spivack] So from the position where the defendants have, we allege, acted in concert, where they have dominated Blue Chip from the beginning, where they had 90 per cent of Blue Chip stock, the defendants will be placed in a position where they can't act in concert because no one of them has more than 4½ per cent of the stock, and none of them have any voting rights, and none of them can participate in the operation of Blue Chip.
>
> "So I think that effectively deprives the defendants of control of Blue Chip. And all the arguments to the contrary just ignore the provisions of the decree that prevent a concerted action, that prohibit voting, that prohibit participation in Blue Chip, and prohibits them acting in concert." (Tr. June 5, 1967, 10.)

After the reorganization occurs, Blue Chip must present a plan for divestiture of one third of its business. (App. B, 15a) The divested portion of the business will be in a contiguous area in Southern California. (App. B, 16a) The purchaser must be acceptable to the Government and the Court, and must offer a non-franchise trad-

ing stamp service. (App. B, 16a-17a) Blue Chip is enjoined from offering any service at all in the contiguous area for at least one year and is required to compete in that area thereafter. (App. B, 16a-17a)

With divestiture, there will be two non-franchise stamp companies. Blue Chip will then be placed under a severe competitive handicap because of the territorial limitation on its business. The new company, and, indeed, every other trading stamp company will be able to offer a stamp service in *all* of Southern California and *all* of the state while Blue Chip will be unable to do so. All of these companies, including the new company, will thus have every incentive and opportunity to compete for Blue Chip's patrons.

The Government was convinced of the effectiveness of this divestiture provision in dissipating the effect of the alleged monopoly and specifically stated to the district court that the first prospective purchaser for the business to be divested had already sought preliminary Government approval.*

---

* "[BY MR. SPIVACK] Third, the decree dissipates Blue Chip's monopoly position. The decree provides that in 30 months — or within 30 months — after Blue Chip is reorganized, new Blue Chip will come up with a plan to divest itself of one-third of its statewide business; all of that business is to be located in Southern California; is to be divested to a purchaser who will agree to abide by the terms of the decree; will be acceptable to the Government or this court, will have to agree to conduct a non-franchise stamp business in Southern California for a reasonable period of time.

"THE COURT: Let me ask you this question: Is that provision economically realistic?

"MR. SPIVACK: Yes, I think so.

2. The District Court Insisted That Any Decree Effectively Dissipate The Alleged Monopoly; It Considered All Proposed Alternatives.

At all times, the District Court made it abundantly clear that it was determined to break up the alleged monopoly position of Blue Chip. At the conclusion of the hearing concerning the second decree, the court stated that it would not sign the decree because it would not create competition in the trading stamp business; because it was "unjust and not operable", and because the viability of the new non-franchise stamp company proposed

---

"THE COURT: What studies has the Department made?

"MR. SPIVACK: None.

"THE COURT: For you to make that statement?

"MR. SPIVACK: None. That is based on my knowledge of the business gained from this case and prior cases. It is our judgment that it is realistic.

"And I can add another thing, I have got a buyer for that that wants to buy it right now — Gold Bond wants to buy it right now.

"I told them they couldn't buy it. So I assume if they are willing to buy it today, they will be willing to buy it 30 months from now.

"If they are willing to buy it, probably somebody else will be willing to buy it.

"THE COURT: What is your present objection to Gold Bond?

"MR. SPIVACK: We presently consider Gold Bond one of the top five trading stamp businesses in the United States, a substantial competitor in this market.

"We think that before they would be allowed to buy that kind of a share of market, the Southern California business, that they demonstrate they can't come in here through internal growth, and I want to see what happens in the next three years.

to be created pursuant to the decree* appeared doubtful (Tr. Dec. 15, 1966, 403-5). District Judge Ferguson then set forth two essential requirements for *any* decree that he would approve, whether before or after trial:

> "The problem then requires two things. One, to establish a viable new company, a viable stamp business in California which will compete with S & H, and also at the same time eliminate the monopoly which Blue Chip presently has today." (Tr. Dec. 15, 1966, 404)

Judge Ferguson's primary concern to dissipate the alleged monopoly and create additional competition in

---

"I told them that if they came in, made a bona fide effort and tried to break into this market and they couldn't do it, then they would be an acceptable purchaser 30 months from now. But I want to see what happens.

"Now, once this decree does go into effect, your Honor, since Blue Chip does urge its signing, Blue Chip will, in fact, be splitting itself in half in Southern California. You are going to have three strong competitors in Southern California, S & H, New Blue Chip and the purchaser of one-half of Blue Chip's Southern California business.

"THE COURT: To go back to Gold Bond again, did they indicate that they would go on a non-franchise basis?

"MR. SPIVACK: I told them what the terms of the decree were and they said they would be willing to buy [sic] bound by those terms, the terms of the decree. And that decree provides for a non-franchise basis.

"So you are going to have three strong competitors in Southern California, S & H, New Blue Chip and the buyer of one-third of New Blue Chip — or one-half of the Southern California business. (Tr. June 5, 1967, 11-13.)

* The entire statement of reasons by the Court at the hearing is set forth in App. D hereto.

the trading stamp business is reflected again and again in the hearing on the motions to intervene on July 31, 1967. In an exchange with counsel for the service station operators, District Judge Ferguson stated:

> "Now I want to eradicate any conception in your mind that I am trying to protect the Blue Chip Stamp Company, because, sir, I can tell you I am not.
>
> "I want to do all I can to bring in competition in the non-franchise stamp business in California.
>
> "There is nothing you have told me, nothing that I have read, nothing that I have gleaned, any single scintilla of evidence or hint in the extensive memoranda which have been filed which indicates to me that anything else can be done except what I have done." (Tr. July 31, 1967, 39-40)

A subsequent exchange with the same counsel also expressed the Court's willingness to consider any alternative proposal which might establish greater competition:

> "THE COURT: You want to intervene — and I have to admire Mr. Gold [counsel for appellant Thrifty Shoppers] for his honesty — you want to intervene to take advantage of the Government's lawsuit for your own private interest. And I guess maybe there is nothing wrong in that.
>
> "MR. DOWNS: Rule 24(a) says it is our interest, and that is the reason we want to intervene.
>
> "THE COURT: Because you want to win your private lawsuit.

"MR. DOWNS: Well, more than that, we want to see competition of four or five competitors of this state which will really give us the choice —

"THE COURT: Well, you are going to have to demonstrate to me that this decree will not accomplish that. And you haven't presented one scintilla of evidence to me that anything else that you propose is better than the present decree.

"And in the final analysis you want to win your private lawsuit, and I guess that is what lawyers are for. And they should try to win their private lawsuits.

"But I am not going to upset this decree under any circumstances until you have convinced me that the plan you propose is a better plan to bring in competition of the non-franchised stamp business in California.

"MR. DOWNS: Yes.

"THE COURT: And you haven't done it. You haven't even approached it closely." (Tr. July 31, 1967, 41-42)

In exchanges with counsel for appellant Thrifty Shoppers, the same determination was manifest:

"THE COURT: You see, I want to bring in two non-franchised stamp companies. I want a company to come in that is going to be bigger than Blue Chip and maybe drive them to their knees. Frankly, I hope that that is accomplished.

"MR. GOLD: Well, I don't think you —

"THE COURT: If you can tell me another way in which that can be done I take my hat off to you." (Tr. July 31, 1967, 30-31)

Appellants objected to the decree, but at no time did they offer nor do they now offer a plan to replace Blue Chip with an acceptable non-franchised trading stamp of general availability. And yet the careful studies of California, Certified and CGA showed this to be absolutely essential to preservation of competitive conditions in the grocery business in California*. The District Court found the objections to the decrees to be without merit, and the failure to suggest an acceptable alternative was fatal to the motions to intervene:

---

* California, Certified and CGA repeatedly asserted that the competitive conditions in the retail grocery business (indeed, survival of many grocers) could only be maintained if the small grocer could obtain a trading stamp which was the same as or comparable to that stamp used by the larger chains (R. 1509-1512, 1520-26; 1558-1560, 1567-1571, 1577-1588). They argued that since a franchise stamp company, such as S & H, does not license grocers in competition with one another (R. 1850-54) and the number of responsible franchise stamp companies is limited (R. 1850-54; 2146), the result of a dissolution of Blue Chip would be that a few larger chains would obtain the franchise stamps and their smaller competitors and other chains would be without a reliable stamp (R. 1850-54).

It was this concern over the effects of the franchise stamps that led to the creation of Blue Chip and the non-franchise concept (R. 1830-32). By providing the Blue Chip stamp to all retailers, the smallest grocer in competition with the largest chain using Blue Chip could offer the same Blue Chip stamp if he so desired (R. 2094-2104). In addition, the smallest grocer in competition with the largest chain using a franchise stamp was assured of the availability of a reliable Blue Chip stamp which was comparable to any fran-

[THE COURT]:

"I personally am convinced, after as detailed a study as any human being can make on this bench, that the decree which is now in full force and effect is that type of decree which will properly, speedily, effectively and economically restore — not restore but bring into the non-franchised stamp business of California effective viable competition.

"And if I didn't think it did, I can assure all the movants here this morning, and everybody else in the courtroom, that I would have never under any circumstances signed that decree.

"And if they could present to me, or if they had presented to me a better plan to restore competition in the revelant market I would think that there would be more validity towards their motions.

"But they haven't. And I think that the decree now in full force and effect is a good and valid decree, and therefore there is no merit whatsover

---

chise stamp service (R. 2092-94). The Blue Chip stamp was, according to California Certified and CGA, the salvation of the small grocer in California (R. 2094-2104) and it was the use of Blue Chip by others than the retailer defendants and the failure of any franchise stamp company to go non-franchise that caused over two-thirds of the growth of Blue Chip (R. 2123-24, 2136-37).

The Government during the negotiations also took the position, and the District Court was of the same view, that a non-franchise trading stamp must be available which is comparable to a franchise stamp service and which would maintain effective competition in the grocery and other retail businesses. (Tr. Dec. 15, 1966, 402-404; July 31, 1967, 53.)

to the motions of the moving parties." (Tr. July 31, 1967, 72-73)

Judge Ferguson also asked both the Government and the State of California whether they could conceive of a decree which could "better open up competition in the non-franchised stamp business in California" (Tr. July 31, 1967, 53, 65) and both replied that they could not (July 31, 1967, 53-55; 65-67).

3. The Decree Also Meets The Standards Of Relief Of The Grinnell Case (384 U.S. 563) And The Du Pont Case (366 U.S. 316).

Appellants rely heavily on *United States v. Grinnell Corp.*, 384 U.S. 563, and *United States v. Du Pont & Co.*, 366 U.S. 316; but it should be noted that both of there were litigated cases in which the propriety of relief *after trial* was questioned. In *Du Pont* this Court carefully noted that:

> "Appellees rely on several Clayton Act consent decrees granting relief short of divestiture, but the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." (366 U.S. 316, 330, fn. 12)

But even if viewed as if it were the result of a litigated case, the present decree meets the standards of *Grinnell*. This Court there, contrary to appellants' argument here, did not order "complete divestiture". Rather, the Court stated that to "break up or render impotent" the monopoly power (384 U.S. 563, 577) there involved:

> "That there should be *some divestiture* on the part of ADT seems clear; but the details of such divestiture must be determined by the District Court as the matter cannot be resolved on this record." (384 U.S. 563, 578) [Emphasis added]

As noted above, insofar as the retailer defendants are concerned, control over Blue Chip is effectively eliminated. Insofar as the alleged monopoly position of Blue Chip is concerned, the remedy need not be eradication of Blue Chip*. Relief provisions in Section 2 cases generally require a disposition of part of the business to reduce the market share and thus "break up" the monopoly.** This is exactly what the present decree requires — presentation to the Court of a plan for the sale of one-third of the business of Blue Chip under conditions designed to ensure a substantial and viable non-franchise

---

* The *Du Pont* case (366 U.S. 316) relied on so heavily by appellants was, of course, a Clayton Act, Section 7 case involving a divestiture of stock, but even there this Court rejected the Government's argument there that divestiture was "required" whenever a violation of Section 7 was found (366 U.S. 316, 328, fn. 9). Although the *Grinnell* case, 384 U.S. 563, was not a Section 7 case, its monopoly postion had been obtained in large part by a series of mergers or asset acquisitions (384 U.S. 563, 567-568) and the individual companies were not ordered destroyed.

** See, e.g., *United States v. United Fruit Co.*, 1958 CCH Trade Cas. ¶68, 941 (E.D. La.) [creation of new company to import fruit]; *United States v. National Linen Service Corp.*, 1956 CCH Trade Cas. ¶68, 398 (N.D. Ga.) [disposition of certain branches and routes].

trading stamp competitor* and circumstances which provide additional competitive opportunities for other stamp companies.

Finally, even in litigated cases, it is well established that district courts ". . . are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States,* 332 U.S. 392, 400-401; *Besser Mfg. Co. v. United States,* 343 U.S. 444, 449.

It is true, as noted by appellants, this Court stated in the *Du Pont* case that:

> "Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences." (*United States v. Du Pont & Co.,* 366 U.S. 316, 327)

However, the second proposed decree was rejected precisely because the Court was satisfied that it would *not* be effective, or workable, or establish additional competition in the trading stamp business (Tr. Dec. 15, 1966, 403, 406).

The problem of framing an effective decree here was a complex one because of the direct effect of trading stamps upon retail competition and particularly competition in the grocery industry. It was effectively demon-

---

* The court viewed this as the "very fundamental keystone, the cornerstone to this decree." (Tr. July 31, 1967, 17).

strated by the California Attorney General (R. 2112-2135, 2140-2173), among others, that to grant different relief than the present consent decree appealed from would not only fail to dissipate the alleged monopoly but would likely bring about the results this Court sought to prevent in *United States v. Von's Grocery Co.*, 384 U.S. 270: an increase in concentration and a decrease in competition in the California grocery industry.

This is a consent decree finally hammered out after protracted negotiations. The District Court was unquestionably dedicated to opening the trading stamp market and specifically sought and obtained agreement that it retained full jurisdiction under certain discretionary provisions of the decree in order to achieve that end (Tr. June 5, 1967, 74-75; July 31, 1967, 61-63). Under such circumstances, the following statement of this Court is uniquely *apropos*:

> "The formulation of decrees is largely left to the discretion of the trial court, and we see no reason to reject the judgment of the District Court that the relief it granted will be effective in undoing the violation it found in view of the fact that it also retains the cause for future orders, including the right of visitation if deemed appropriate."
>
> *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 473.

B. Appellants Had No Right To Intervene Under Federal Rules Of Civil Procedure 24(a) And The District Court Properly Exercised Its Discretion In Denying Intervention Under Rule 24(b).

1. Appellants Had No Right To Intervene.

Intervention as of right in the federal District Court is governed by Rule 24(a) of the FRCP which provides in part that a proposed intervenor must make "timely application"* and also establish that he

> " . . . claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ."**

Appellants have made no showing of an "interest relating to the property or transaction" which was the subject of the Government's action, or which is not protected by the consent decree. Appellants have filed treble damage actions now pending in the District Court, charging the defendants with substantially the same violations

---

* The reasons why the motions were not timely are fully set forth in the court's opinion (App. C 25a-31a) and will not be repeated here. However, we note that with respect to Thrifty Shoppers, the motion to vacate under Federal Rule of Civil Procedure 59(e) was not filed until July 12, 1967, and more than 10 days after the entry of judgment on June 5, 1967. FRPC 6(b) specifically provides that this 10-day time limit under FRCP 59(e) cannot be extended, and the motion to vacate the judgment by Thrifty Shoppers was therefore not timely.

** Appellants do not claim any right to intervene under Rule 24(a)(1) which authorizes intervention "when a statute of the United States confers an unconditional right to intervene. . . ."

as charged in the Government complaint and this "interest" is in no way "impaired or impeded" by the consent decree since their purported "interest" can be satisfied by a money judgment or, upon a proper showing in their own actions, by some other form of relief for any injury they may prove.

2. Neither The El Paso Case (386 U.S. 129) Nor The Missouri-Kansas Pipe Line Co. Case (312 U.S. 502) Supports Appellants' Claimed Right To Intervene.

We respectfully suggest that the carefully reasoned opinion of District Judge Ferguson (App. C, 29a-31a), sufficiently distinguishes the *El Paso* case. There is no need for us to belabor the point here. That the *El Paso* case has not swept away the long-standing policy against permitting intervention in Government antitrust suits was demonstrated in the last term by this Court's summary dismissal of an appeal from denial of a motion to intervene in *United States v. Aluminum Company of America*, 41 F.R.D. 342 (E.D. Mo.), appeal dismissed *per curiam sub nom. Lupton Mfg. Co. v. United States*, 388 U.S. 457 (Docket No. 1296, October Term 1966). Accord: *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689; *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 140-42.

Granting intervention here would not serve the purpose of giving appellants "an opportunity to be heard" as in *El Paso* (386 U.S. 129, 136), since appellants have already had every opportunity, and fully exercised it, to be heard as *amici curiae*. Nor would it serve the purpose, as in *El Paso*, of providing a means for this Court to

assure that its mandate, issued after a litigated judgment, is carried out.* (386 U.S. 129, 136)

As for appellants' reliance on *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, the earlier decree there had specifically reserved to petitioner the right later to intervene and this Court carefully noted that its decision to permit intervention was based solely upon that specific decree provision and not upon general principles governing intervention (312 U.S. 502, 506).

---

* This Court, of course, has "plenary power" to determine whether its earlier mandate "was scrupulously and fully carried out." *United States v. Du Pont & Co.*, 366 U.S. 316, 325. In *Continental Ins. Co. v. United States*, 259 U.S. 156, 166, this Court stated:

> "We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion."

CONCLUSION

We respectfully submit that appellant's motions were not timely and that they were not meritorious. They do not raise any issues not fully argued by appellants as *amici curiae* and rejected by District Judge Ferguson after careful consideration. We urge that the carefully reasoned opinion of Judge Ferguson (App. C) is clearly correct and that the decree should be carried out.

The motion to dismiss or affirm should be granted so that "bona fide and diligent" efforts to carry out the relief provided by the decree may be consummated without further delay.

DATED: January 2, 1968.

Respectfully submitted,

WILLIAM W. ALSUP
ALLYN O. KREPS
THOMAS J. READY
ARNOLD M. LERMAN
JOSEPH A. WOODS, JR.
WILLIAM E. MUSSMAN
DAVID T. STEFFEN

GORDON JOHNSON
CHESTER H. BRANDON
JAMES E. COX
MARK G. ANCEL
WILLIAM J. CURRER, JR.
G. RICHARD DOTY

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 63-1552-F

UNITED STATES OF AMERICA,

Plaintiff,

v.

BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,

Defendants.

ORDER DENYING MOTIONS

WHEREAS, on October 28, 1966 the Government and all but two defendants lodged a proposed decree settling the above action as to said parties and the proposed decree was set for argument December 13, 1966; and

WHEREAS, said hearing received wide publicity and numerous parties filed briefs *amici curiae* opposing the proposed decree or made appearances at the argument and argued in opposition to said decree; and

WHEREAS, on December 13, 14 and 15, 1966 argument by all parties and by numerous *amici curiae* was heard by the Court, which thereon determined not to

enter the proposed decree and outlined certain principles to be considered in any decree settling the case; and

WHEREAS, on April 28, 1967 a proposed consent decree was lodged settling the case as to all parties and the matter was set down for argument June 5, 1967, with notice being given all persons shown by the record as having appeared as *amici curiae* in said case; and

WHEREAS, numerous persons filed briefs *amici curiae* in opposition to said proposed consent decree, including Thrifty Shoppers Scrip Co. and Independent California Service Station Operators; and

WHEREAS, on June 5, 1967 numerous persons appeared in opposition and made oral argument in opposition to said proposed decree, including the two persons just named and Raley's, Inc., who at that time presented both written and oral argument, following which said proposed final judgment was duly signed and entered; and

WHEREAS, the persons listed below served the motions indicated relative to said judgment:

(i) On June 15, 1967 the Independent California Service Station Operators served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure and a motion to vacate said judgment;

(ii) On July 14, 1967 the Independent California Service Station Operators served a motion under Rule 15 (a) of the Federal Rules of Civil Procedure to substitute an amended complaint in

intervention for the complaint in intervention previously served and filed by it;

(iii) On July 7, 1967 Thrifty Shoppers Scrip Co. served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure and a motion to vacate said judgment; and

(iv) On July 14, 1967 Raley's, Inc. served a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure; and

WHEREAS, notice having been duly given, memoranda of authorities having been submitted by said movants in favor of their motions and by all parties to said judgment in opposition to said motions, and the matter having come on to be heard on July 31, 1967 and oral argument being heard and considered;

IT IS HEREBY ORDERED that all said motions be denied for the following reasons among others:

Said motions were not made upon timely application;

No sufficient interest in the subject matter of said judgment has been established by any of said movants;

All interests of each of said movants are included within these public interests which have been considered and safeguarded by the action of the Government herein;

Each movant has failed to establish any valid reason why said judgment should be altered; and

To grant any said motion would unduly delay and prejudice the rights of the parties hereto.

Dated: August 3, 1967.

/s/ WARREN J. FERGUSON
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 63-1552-F

UNITED STATES OF AMERICA,

Plaintiff,

v.

BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,

Defendants

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint in the United States District Court for the Southern District of California, Central Division, on December 26, 1963; each of the defendants having appeared and filed its answer denying the substantive allegations thereof; and the plaintiff and the defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, without the taking of any evidence, and without this Final Judgment constituting any evidence or admission by any party in respect to any issue of fact or law herein;

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law

herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties consenting hereto. The complaint states claims for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act.

II.

For the purposes of this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, association, corporation or other legal or business entity;

(B) "Trading stamp business" shall mean the distribution for compensation, of trading stamps to any person for issuance to its customers, employees or others, and the redemption of said stamps for merchandise or money;

(C) "Trading stamp company" shall mean a person engaged in the trading stamp business;

(D) "Capital Assets" shall mean land, buildings, leasehold improvements, furniture and fixtures, warehouse equipment, delivery equipment and automobiles.

(E) "Southern California" is that part of California south of the line formed by the northern boundaries of San Luis Obispo, Kern and San Bernardino Counties.

(F) "New Blue Chip" shall mean a purchaser of, or any other successor to, Blue Chip's trading stamp business pursuant to Section VI herein or a reorganized company pursuant to Sections V or VII herein.

(G) "Reorganization" shall mean a reconstitution of the stock structure of Blue Chip and shall include the creation of a new company to which the assets and liabilities of Blue Chip are transferred, or into which Blue Chip is consolidated or merged.

III.

The provisions of this Final Judgment applicable to any defendant and any person agreeing to be bound shall also apply to each of its subsidiaries, successors, assigns, officers, directors, and employees, and to all other persons in active concert or participation with such defendant or persons who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between or among such defendant or person and its officers, directors, employees, parent company, subsidiaries and affiliates, or any of them.

IV.

Each of the retailer defendants is enjoined and restrained from:

(A) Combining or conspiring to restrain trade in, or monopolizing or attempting to monopolize the trading stamp business in the State of California; or carrying out, directly or indirectly, any such combination, conspiracy, attempt to monopolize or monopolization;

(B) Entering into any contract, agreement or understanding with any other user of trading stamps in the same line of business:

(i) To refrain, in the State of California or in particular areas thereof, from using trading stamp services entirely or from using the trading stamp services of any particular person or persons; or

(ii) To limit the rate of issue employed in distributing trading stamps to their respective customers in such state;

(C) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company to operate in the State of California except as provided in Sections V, VI or VII hereof.

Provided, that this Section IV shall not apply to a retailer defendant, acting independently: (i) in obtaining or entering into any contract to obtain trading stamp services from any trading stamp company; or (ii) when such defendant is engaged in the trading stamp business (either directly or through a subsidiary or affiliate), in furnishing or entering into any contract to furnish trading stamp services to any person, and provided further that this Section IV shall not apply to the provision of trading stamp services by any trading stamp company which is not named as a defendant herein.

V.

Blue Chip is ordered and directed to present to the Court, within 60 days following the date of entry of this Final Judgment, a plan for the reorganization of Blue Chip Stamp Company. The plan shall be substantially in

accordance with either of the plans heretofore furnished to plaintiff. Upon approval of the plan by the Court, Blue Chip shall make bona fide and diligent efforts to reorganize the company pursuant to the said plan. If at any time, in plaintiff's judgment, such efforts are not being made, plaintiff may apply to the Court for an order directing that this Section V shall no longer apply. In the event that such order issues, Blue Chip shall be required to divest pursuant to Section VI or to reorganize pursuant to Section VII hereof.

VI.

(A) In the event that Section V becomes inapplicable Blue Chip is ordered and directed to divest, with all due diligence, within 15 months from the date upon which Section V shall no longer apply, all of the company's capital assets, goodwill, and the right to the service mark and to the use of the name "Blue Chip," and, following such divestiture, to discontinue issuance of trading stamps, cease doing business as an operating company and thereafter to wind up its affairs and dissolve consistent with the applicable laws of the State of California. The divestiture shall be made upon the following terms and conditions:

(1) The purchaser or successor to Blue Chip's trading stamp business shall agree to enter its appearance in this proceeding and shall furnish its written consent to be bound by the applicable provisions of this Final Judgment.

(2) The purchaser or successor shall agree to engage in the trading stamp business in California for a reasonable period of time.

(3) The purchaser or successor shall contract with Blue Chip on mutually satisfactory terms for the redemption of all outstanding trading stamps theretofore issued by Blue Chip and said contract shall insure discharge of Blue Chip's redemption obligations and shall require the purchaser or successor to redeem its stamps interchangeably with the trading stamps theretofore issued by Blue Chip.

(4) The purchaser or successor shall assume such other obligations as Blue Chip and it may agree and Blue Chip shall transfer such cash, securities or other assets as it and Blue Chip may agree.

The said divestiture may be made by a sale of assets, a sale of stock of a corporation which controls the assets, or in any other manner not otherwise inconsistent with the terms of this decree. Provided, that in the event that all of the stockholders of Blue Chip dispose of their stock to a purchaser or successor said disposal shall be regarded as a divestiture by Blue Chip for the purposes of this Final Judgment.

(B) Blue Chip shall make known the availability of the assets for sale. Blue Chip shall furnish to bona fide prospective purchasers making inquiry to it, such information as is reasonably necessary for them to proceed with negotiations looking toward the ultimate acquisition of the assets to be divested and shall furnish plaintiff concurrently with the name of any such prospective purchaser. Blue Chip shall render quarterly reports to the Assistant Attorney General in charge of the Antitrust Division concerning its efforts to effectuate the divestiture

required, the first such report to be rendered within 30 days of the date that Section V shall no longer apply.

(C) At least 30 days in advance of the closing date specified in any contract for sale, Blue Chip shall supply plaintiff with the name of the proposed purchaser, the purchase contract, and with such other information in its possession as is material to the proposed sale. If plaintiff requests, the said closing date shall be extended to the extent necessary to afford plaintiff 60 days between the date of the receipt of the said information and the closing date. Blue Chip may close any sale unless plaintiff serves upon Blue Chip, at least 15 days in advance of the closing date, written notice that plaintiff objects thereto. If plaintiff serves such written notice with respect to a sale to a purchaser engaged in the trading stamp business, or a purchaser engaged in the operation of retail food stores in the State of California, such sale shall not be closed. If plaintiff serves such written notice with respect to any other sale, the sale shall not be closed unless approved by the Court. The time period set forth in Section VI(A) above shall be tolled during the pendency of any extension or of any proceeding under this Section VI(C).

(D) The divestiture ordered and directed by Section VI(A) of this Final Judgment shall be made in good faith and shall be absolute and unqualified except as follows:

(1) Nothing herein contained shall be deemed to prohibit Blue Chip from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust or any other form of security reasonably necessary to secure full payment of the price at which the

divested property is disposed of or sold or to secure any other obligation of a purchaser or successor, provided that if Blue Chip shall regain ownership of or control over the property divested as a result of any lien, mortgage, deed of trust, or other undertaking Blue Chip shall be required to terminate such ownership or control within 18 months thereafter.

(2) In the event that Blue Chip receives, as a result of any divestiture hereunder, stock of a corporation which controls the divested assets:

(a) Blue Chip shall be required: (i) to dispose of any amount of such stock in excess of 10% of the outstanding common stock of such corporation within one year following the date of receipt thereof or within 22 months following the date Section V shall no longer apply, whichever is earlier, provided that in no event shall such disposal be required within less than three months following the date of receipt of such excess; and (ii) to dispose of the balance of such stock no later than the date of final distribution in liquidation; and (iii) pending disposal, to cause any voting rights of such stock to be exercised by a financial institution or other third party who is acceptable to plaintiff or approved by the Court; and

(b) In the event Blue Chip distributes such stock to its shareholders, no distribution shall be made pursuant to which any Blue Chip shareholder will retain more than 1% of the outstanding common stock of the said corporation

unless the plan of distribution is acceptable to plaintiff or approved by the Court.

VII.

In the event that Section V becomes inapplicable, Blue Chip may also enter into a reorganization pursuant to a plan for the reorganization of Blue Chip Stamp Company acceptable to the Court. The plan shall be substantially in accordance with either of the plans heretofore furnished to plaintiff or in accordance with any other plan acceptable to Blue Chip and to plaintiff.

VIII.

(A) Blue Chip is ordered and directed to continue its trading stamp business and to continue to promote its trading stamp service until completion of the reorganization set forth in Sections V and VII above or until the divestiture set forth in Section VI above. Until such reorganization or divestiture Blue Chip is enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using Blue Chip's stamp service; (ii) the rate of issue employed by such person in offering Blue Chip's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person: (i) to limit the rate of issue employed in offering Blue

Chip's or any other person's stamps; or (ii) to refrain from using any other trading stamp service.

(B) New Blue Chip, in the event that it is not already a party hereto, shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. A purchaser of assets pursuant to Section IX hereof shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. New Blue Chip and such purchaser are enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of; (i) the presence in the same locality of any establishment operated by another person using the company's stamp service; (ii) the rate of issue employed by such person in offering the company's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person (i) to limit the rate of issue employed in offering the company's or any other person's stamps; or (ii) to refrain from using any other trading stamp service;

(3) Having as an officer or employee any person who, while holding such position, also serves as an officer, director, or employee of any person using trading stamp services; or from having, for a period of ten years following the date of entry of this Final Judgment, as a director, any person who, while holding such position, also serves as an officer,

director or employee of any person who was a Blue Chip stockholder in 1956 or 1957.

(C) Each of the retailer defendants is enjoined and restrained for a period of ten years following the date of entry of this Final Judgment:

(1) From having as an officer, director, or employee any person who, while holding such position, also serves as an officer, director or employee of New Blue Chip; or

(2) From exercising any right which it might acquire to vote for the election of any official of New Blue Chip; *provided* that a retailer defendant may cause such right to be exercised independently by a financial institution or other third party acceptable to plaintiff or approved by the Court.

Each retailer defendant shall be free to utilize or not utilize the trading stamp services of Blue Chip and New Blue Chip and, except as provided in this Section VIII(C), to exercise the same rights and privileges available to every other user of the stamp services of Blue Chip or New Blue Chip.

IX.

New Blue Chip shall, within 30 months after the date of completion of the reorganization under Sections V or VII above or the divestiture under Section VI above present for the approval of the Court a plan which shall include the following terms:

(1) New Blue Chip shall offer for sale one-third of its then existing trading stamp business in the

State of California. The business to be offered for sale shall be located within a contiguous geographic area within Southern California.

(2) A purchaser shall be permitted to acquire the business only upon the condition that it enter its appearance in this proceeding and agree: (i) to be bound by the applicable provisions of Sections VIII(B), IX, X and XI of this Final Judgment and (ii) to engage in the trading stamp business for a reasonable period of time. A purchaser shall have the right, if it so elects, to redeem New Blue Chip trading stamps within the contiguous area for the period of one year following the consummation of the sale. Plaintiff shall have the right to object to a purchaser in the same manner as it may object to a purchaser under Section VI(C) above.

(3) New Blue Chip shall not, during the period of one year following the consummation of the sale: (i) knowingly allow any person operating retail establishments in the contiguous area to issue New Blue Chip stamps to customers of such establishments; or (ii) furnish New Blue Chip stamps to any person with knowledge that the stamps will be issued to customers at any retail establishment in the contiguous area; or (iii) otherwise engage in the trading stamp business in the contiguous area except that, if the purchaser does not elect to redeem New Blue Chip stamps or if the purchaser fails to perform in accordance with his redemption obligations, New Blue Chip shall have the right to redeem its outstanding stamps in said area. Following the said one year

period, New Blue Chip shall offer its trading stamp service in the contiguous area.

X.

For the purpose of securing compliance with this Judgment and for no other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, New Blue Chip, or any purchaser under Section IX hereof, made to its principal office, and subject to any legally recognized privilege, be permitted:

(1) Access during the office hours to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of any person specified in this Section X(A) related to any matters contained in this Judgment;

(2) Subject to the reasonable convenience of, and without restraint or interference from, any person specified in this Section X(A), to interview officers or employees of any such person who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, any defendant, New Blue Chip or a purchaser under Section IX shall submit such additional reports in writing with respect to the matters contained in this Final Judgment as may be requested. Provided that no infor-

mation obtained by the means provided for in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for construction, carrying out, modification, termination or enforcement of or compliance with the provisions of this Final Judgment and for the punishment of violations thereof.

Dated: June 5, 1967

/s/ WARREN J. FERGUSON
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 63-1552-F

UNITED STATES OF AMERICA,

Plaintiff

v.

BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,

Defendants

INDEPENDENT CALIFORNIA SERVICE STATION OPERATORS, plaintiffs in the action of TWYMAN, et al. v. BLUE CHIP STAMP COMPANY, et al.,

Petitioners for Intervention

RALEY'S, a corporation,

Petitioner for Intervention

THRIFTY SHOPPERS SCRIP CO.,

Petitioner for Intervention

OPINION DENYING MOTIONS TO INTERVENE AND TO VACATE CONSENT DECREE

On June 5, 1967, the Court approved and signed a consent decree in this antitrust action. Subsequent thereto Petitioners for Intervention filed motions which seek —

(a) to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure;

(b) to be permitted to intervene under Rule 24(b); and

(c) to vacate the consent decree of June 5, 1967.

At the conclusion of argument on July 31, 1967, the Court orally announced its decision, and by minute order denied the motions. This opinion is written in order to permit a studied examination of the Court's views.

BACKGROUND

On December 26, 1963, the United States filed its complaint alleging that Blue Chip Stamp Company, Thrifty Drug Stores Co., Inc. (the largest pharmacy chain in California) and eight grocery chains (whose 1962 sales constituted 30 percent of all sales of grocery stores in California) had since 1955 engaged in a conspiracy in restraint of trade, and had monopolized the trading stamp business in California, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). The complaint sought an injunction against continuation of the activities charged and asked that the defendant retailers be enjoined in the future from using Blue Chip stamps.

After the case was filed, the Government and the defendants engaged in detailed negotiations to settle the litigation by consent decree. These negotiations extended over two years in time, and the Government afforded an opportunity to all defendants and to all other parties expressing an interest in the case to be heard. As a result of these negotiations, three separate consent de-

crees were proposed, each of which was lodged with this Court. In order that interested parties might have time to study each proposed decree and to make known their views with respect to it, there was annexed to each decree a stipulation providing that all signatory parties consented to entry of the given decree after 30 days unless the Government withdrew its consent during the 30-day period.

On July 22, 1966, the first proposed decree was lodged with the consent of all parties except defendants Market Basket and Thriftimart. The two non-consenting defendants as well as the State of California, Certified Grocers Association, and California Grocers Association (all non-parties), raised objections to the decree before the 30-day period had expired. The Government then withdrew its consent and the decree was withdrawn.

Following further negotiations, a second decree was drafted and lodged with the Court on October 28, 1966. The annexed stipulation to the decree was signed by the Government and all defendants except Market Basket and Thriftimart. The Government and the consenting defendants filed briefs in support of the decree. The two non-consenting defendants, and the California Grocers Association, Certified Grocers Association, S & H Stamp Company, and the State of California filed briefs in opposition to entry of the decree. On December 13, 14 and 15, 1966, this Court held hearings, and all parties favoring or opposing the decree were given opportunity to be heard. At the conclusion of the hearings, the Court refused to sign the proposed decree and outlined certain requirements it believed essential to any decree settling the case.

On April 28, 1967, a third decree was lodged, consented to by all defendants. The Court ordered notice should be given to all parties previously appearing in the case, including parties *amici curiae*. Argument was set for June 5, 1967. Such notice was given. Briefs in favor of this third proposed decree were filed by the Government, all defendants, and also by the State of California, the California Grocers Association, and Certified Grocers Association, who had been active in opposing the earlier decrees. Briefs *amici curiae* in opposition to the proposed decree were filed by the petitioners herein, by S&H Stamp Company, and by Gold Bond Stamp Company. After a study of the briefs and consideration of the oral arguments, the Court signed and entered the proposed decree on June 5, 1967.

DESCRIPTION OF PETITIONERS

Independent California Service Station Operators are plaintiffs in the case of *Twyman et al. v. Blue Chip Stamp Company et al.*, Civil No. 66-1522-F, now pending before this Court. The complaint therein alleges substantially the same violations as those alleged in the Government complaint (violation of Sections 1 and 2 of the Sherman Act). Likewise, the Government complaint is incorporated in the petition to intervene. The service station operators suing in *Twyman* and seeking to intervene here claim that by virtue of the Blue Chip trading stamp monopoly, a customer demand has been created for trading stamps, so that service station operators must give trading stamps. It is alleged that by being thus forced to give trading stamps and by being forced to obtain said trading stamps from a monopoly, the service

station operators are damaged. Their complaint seeks threefold damages under the provisions of 15 U.S.C. §15.

Thrifty Shoppers Scrip Co. is a stamp company which competes with Blue Chip. It has filed an action in this Court, *Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Co.*, No. 67-596-F, against the same defendants as are here, alleging injury in its efforts to compete in the trading stamp business in California due to the restraints of trade and the monopolization by the defendants. Thrifty seeks threefold damages.

Raley's, Inc., a retail grocery chain, also is the plaintiff in a civil action now pending before this Court. A 2% stockholder of Blue Chip, Raley's is suing on behalf of said company and other stockholders. *Raley's et al. v. Alexander's Markets et al.*, Civil No. 64-660-F. Named as defendants are Blue Chip, the other defendants in the Government suit, and certain individual shareholders of Blue Chip Stamp Company. Raley's complaint alleges violation of Sections 1 and 2 of the Sherman Act, and prays for money damages, for a decree requiring the defendants to sell their stock in Blue Chip Stamp Company, and for an injunction prohibiting the defendant shareholders from participating in future profits of Blue Chip. In 1966 Raley's commenced using Gold Bond stamps. From 1959 to 1966 it had used its own stamps; prior to 1959 it had used Blue Chip.

RULE 24

The applicable Rule is Rule 24, Federal Rules of Civil Procedure:

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

QUESTIONS PRESENTED

The questions presented are (1) whether petitioners have a right to intervene [Rule 24(a)], or (2) should be permitted to intervene [Rule 24(b)] in an action brought by the Government and subsequently settled, with the consent of the Court after a full hearing, and, (3) whether, ancillary to this, the petitioners have a right to have the consent decree vacated.

THE PETITIONS WERE NOT TIMELY

Rules 24(a) and 24(b) specifically provide for intervention only upon "timely application". The present motions were neither served nor filed until after June 5, 1967, the date the consent decree was entered. Twyman's motion was filed June 19, 1967; Thrifty Shoppers' on July 12, 1967; and Raley's on July 14, 1967. The rule for intervening after entry of a final judgment is set forth in Barron & Holtzoff, Fed. Prac. & Proc., vol. 2, ¶594:

> "Intervention may be allowed after a final judgment or decree if it is necessary to preserve some right which cannot otherwise be protected, but such intervention will not be permitted unless a strong showing is made."

Petitioners have failed to make any showing at all as to any right which can only be protected by intervention. Furthermore, there is no showing that their applications are "timely".

Each petitioner claims it demonstrated its opposition to the decree by filing an *amicus curiae* brief and by arguing in opposition to its entry. However, if petitioners

had time to make known their opposition to the decree, they had time to file their applications to intervene.

In *United States v. Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Maine 1954), *aff'd*, 221 F.2d 957, *cert. denied*, 350 U.S. 842, the Court stated:

> "Although the determination of timeliness involves a consideration of a number of factors and the time element alone is not controlling, a strong showing must be made by the applicants in order to be allowed to intervene after the entry of a final judgment. See 4 Moore's Federal Practice, 2d Ed., Par. 24.13." 17 F.R.D. at 102.

In *Slusarski v. United States Lines Co.*, 28 F.R.D. 388, 390 (E.D. Pa. 1961), the Court stated: "Where, as here, all issues have been resolved and the litigation concluded, with entry of judgment, we think the application is clearly too late." For similar rulings see *Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965), appeal dismissed — *cert.* improvidently granted, 384 U.S. 28; *Kaplan v. Guardian Life Ins. Co. of Amer.*, 231 F.Supp. 874, 876-77 (W.D. Mo. 1964); *Union Nat. Bank of Youngstown, Ohio v. Superior Steel Corp.*, 9 F.R.D. 124 (W.D. Pa. 1949).

Rule 24 fails to provide any standard by which timeliness may be tested. Thus, it is necessary to look to all the circumstances in a given case. However, the courts do not look with favor upon one who, fully aware of what has transpired, nonetheless fails to act on his rights and is unreasonably tardy in filing a petition for intervention. Thus, it has been stated:

". . . we might say we do not see any reason why these interveners could not have sought intervention much earlier. The Court should also consider the state of the cause. That is, as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have in effect slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania. We do not feel that this is a function of a district court." *Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corp.*, 24 F.R.D. 476, 477 (W.D. Pa. 1959).

The requirement of timeliness is not without foundation. The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances. Such circumstances are not present here. Petitioners have for some time been aware of the existence and nature of the negotiations leading to the final decree entered by this Court. They have been given every opportunity to be heard. Had they felt their interests were not being given adequate consideration, they should have moved to intervene. They chose not to do so, but rather waited until lengthy and complex negotiations had been completed, all arguments of *amici* in opposition to the three proposed decrees had been heard, and a consent judgment entered, before ultimately seeking to intervene.

Petitioners cite *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960), as purported authority for the proposition that intervention is proper after entry of a consent judgment. However, *Kozak* is not applicable here. In that case the motion to intervene came *prior* to entry of the decree and before the issues had been drawn. The opinion did note, however, that "There are even occasions where intervention is proper after judgment." But such cases have typically involved a refusal or unwillingness by the losing party to diligently prosecute the lawsuit, this fact not becoming apparent until after the Court's decision. *E.g., Hurd v. Ill. Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956) (intervention granted at appellate level where in a spurious class action it appeared that certain members of the class doubted the faithfulness of the named plaintiff in prosecuting the appeal on behalf of the class); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953) (intervention granted for purposes of prosecuting appeal by a stockholder who learned after judgment had been entered against the corporation, that the corporation had decided not to appeal, despite the fact that the corporation's suit against its officers to recover allegedly improper profits had been instigated at the request of this stockholder); *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 777 (intervention granted for purposes of prosecuting appeal because affected property owners did not learn until after judgment that the zoning commission did not intend to appeal an adverse judgment). Under circumstances such as these, where the inadequate representation of the petitioner's interest comes to light only after entry of the decree, the courts have been willing, with good reason, to recognize an exception to the general rule forbidding

intervention after entry of the decree. This exception has been narrowly defined: "Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected." *Wolpe v. Poretsky, supra,* 144 F.2d at 508.

Referring again to *Kozak, supra,* the motion to intervene therein, as noted above, was filed before entry of final judgment. Thus, *Kozak* is not authority excusing petitioners here from the necessity of making a "strong showing" as to why they did not proceed more diligently. The delay in serving and filing the motions cannot be overlooked when considered in light of the injury sure to result to the public should implementation of the decree be postponed.

Petitioners contend they meet the requirement of timeliness since the *El Paso* case [*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967)] holds that even after entry of the consent judgment, intervention may be permitted. Whether or not this is in fact the holding in *El Paso,* it is clear that that case does not rewrite Rule 24(a) and (b) to eliminate the requirement of timeliness. After the Supreme Court ordered divestiture, *United States v. El Paso Natural Gas Co.,* 376 U.S. 651 (1964), the District Court held hearings on the form of relief. Twenty parties, including the State of California and Cascade Natural Gas Corp., filed motions to intervene. These motions were filed and denied *before* the District Court entered its consent decree. Thus, in the opinion whereby intervention was denied, the District Court stated, "All that remains is to fashion a divestiture decree which complies

with the mandate of the Supreme Court." *U.S. v. El Paso Natural Gas Co.*, 37 F.R.D. 330, 332 (D. Utah 1965). Of the 20 prospective intervenors, California, and Cascade Natural Gas Corp., appealed to the Supreme Court, along with Southern California Edison Co., which had petitioned to intervene at a later date. The Supreme Court reversed, permitting intervention. The Court's opinion, per Mr. Justice Douglas, does not even discuss timeliness.

As noted above, California, and Cascade Natural Gas Corp. both sought intervention well in advance of entry of the consent decree. It is not clear when the petition of Southern California Edison Co. was filed. However, on these facts, and in view of the fact that the Supreme Court did not discuss timeliness or the dates the petitions were filed, it is clear that *El Paso* cannot be taken as authority for the proposition that intervention may be permitted after entry of a consent decree.

In *El Paso*, the Supreme Court observed that it had a right to protect and to insure obedience to its own previous mandate. Similarly, this Court likewise has broad powers to protect and interpret decrees which it has approved and issued. Obviously, a ruling by a court that intervention is proper to insure compliance with its earlier mandate is no authority for asserting that a court, which has issued a mandate, should permit intervention for the purpose of attacking the mandate. In this respect, *El Paso* is actually authority for the denial of the instant motions to intervene, because the present Court has power to interpret and enforce the mandate which it has issued.

This interpretation of *El Paso, supra,* has been sustained in the most recent session of the Supreme Court. The Government had prevailed in an action brought to force Alcoa to divest itself of Cupples. (*United States v. Aluminum Company of America,* 233 F. Supp. 718, 247 F. Supp. 308 (E.D. Mo. 1962), *affirmed per curiam,* 382 U.S. 12.) During the pendency of the action, and subsequent negotiations for divorcement, Alcoa and Cupples bid on a contract to supply aluminum curtain walls for the proposed New York Port Authority building, under an agreement that if Alcoa were forced to divest itself of Cupples, it would relinquish the contract to Cupples. Lupton Manufacturing Co. also bid to supply aluminum curtain walls for the building. When the order of divorcement became final, Lupton moved to intervene under Rule 24(a) and (b). Lupton did not contend that it had a right to bid free from competition, but rather asserted that if Cupples were permitted to retain the contract it would retain part of the profit of an illegal merger, and thereby frustrate the purposes of the Government's case, namely, to restore free and open competition in the aluminum curtain wall industry. The District Court denied Lupton's motion to intervene and a direct appeal was taken to the Supreme Court. *United States v. Aluminum Company of America and Cupples Products Corp.,* 41 F.R.D. 342 (E.D. Mo. 1967), appeal to Supreme Court dismissed, 87 S. Ct. (Adv.) 2112 (June 12, 1967).

PETITIONERS HAVE NO RIGHT TO INTERVENE UNDER RULE 24(a)

Rule 24(a) governs intervention as of right. In addition to the requirement of "timely application", 24 (a) further requires that a prospective intervenor claim —

> ". . . an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest. . . ."

Petitioners have not demonstrated the existence of any "interest relating to the property or transaction" which is the subject of the Government's suit which might support their applications to intervene.

Each petitioner has filed an action, pending in this Court, charging the defendants with substantially the same antitrust violations as those charged in the Government's case. They seek damages for the injuries suffered as a result of these violations. None of their "interests" are in any way "impaired or impeded" by settlement of the Government's case. Nor is their ability to prosecute their respective cases impaired or impeded by the Government's case. The speculation that petitioners may be benefited in the trial of their respective cases if the Government is forced to litigate its case certainly does not give them an "interest" in the Government's case sufficient to support the motions to intervene.

If the petitioners are appearing merely as members of the public, in the public interest, then it is incumbent

upon them to establish that the Government has not acted properly in the public interest. This they have not done. Congress has vested in the Department of Justice the duty of instituting proceedings in equity to prevent and restrain antitrust violations. (15 U.S.C. §4.) Acting on behalf of the public interest in the present matter, the Government first investigated, and then filed its complaint seeking to restrain the violations and to dissipate the monopoly revealed by its investigation. Substantial effort was expended both in preparing the case for trial and in seeking to negotiate the consent decree, here challenged, to attain the two principles for which the case was originally filed. The decree enjoins those trade restraints alleged to be illegal in the complaint, and provides for drastically reducing the power of the defendant retailers over Blue Chip Stamp Company; defendant retailers are enjoined from acting in concert in the trading stamp industry in the future. The monopoly power of Blue Chip is decreased, and competition is opened.

PETITIONERS SHOULD NOT BE PERMITTED TO INTERVENE UNDER RULE 24(b)

Generally speaking, the right to intervene to defeat entry of a consent decree in any government antitrust action has been consistently denied.

In *Sutphen Estates, Inc. v. United States*, 342 U.S. 19 (1951), the facts were that after the decision in *United States v. Paramount Pictures, Inc. et al.*, 334 U.S. 131 (1948), Warner Brothers Pictures Corpora-

tion was ordered reorganized in a manner similar to divestiture. Sutphen Estates had leased property to a Warner affiliate and Warner had guaranteed the lessee's performance of the lease. Intervention was sought by the lessor to protect its rights against Warner as guarantor. Intervention was denied because the lessor was not a privy of Warner and the "reorganization" decree would not bind the lessor in any legal sense. The Court stated that ". . . the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene". 342 U.S. at 23.

In *Sam Fox Publishing Co. et al. v. United States*, 366 U.S. 683 (1961), the District Court denied certain music publishers intervention in proceedings for the modification of a prior consent decree in a government antitrust suit. On appeal, the Supreme Court, per Justice Harlan, stated:

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. In *United States v. Borden Co.*, 347 U.S. 514, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in clearest terms that 'private and public ac-

tions were designed to be cumulative, not mutually exclusive' (*id.*, at 518). . . ." 366 U.S. at 689.

See also, *United States v. Loew's, Inc. et al.*, 20 F.R.D. 423 (S.D. N.Y. 1957).

In *United States of America v. Radio Corporation of America*, 186 F. Supp. 776 (E.D. Pa. 1960), *appeal dismissed*, 364 U.S. 518, a competitor of the defendant attempted to intervene after a consent decree had been entered, for the purpose of objecting to proposed acquisitions to which the Government did not object. The Court denied intervention, as under the consent decree it had retained jurisdiction only to allow any of the parties to the final judgment — no one else — to apply to the Court for further orders or directions. However, the Court also stated:

> "The Government opposes the motion for intervention and has informed the Court that it has carefully investigated and reviewed all the facts and reached the conclusion that the proposed Boston and San Francisco acquisitions do not violate the decree. In this state of facts, even if I had discretion to allow the intervention, I would not do so. The Government is concerned with the public interest and is satisfied that the conduct which Westinghouse complains of is not against that interest. It would not lead to an orderly administration of justice to allow intervention in this type of antitrust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained. The

movant, if it is aggrieved, must be left to such private remedy as Congress may have provided for it." 186 F. Supp. at 776-777.

This language is particularly significant for the case at bar, where the Government opposes intervention and where the proposed intervenors have already commenced pursuit of private remedies.

PETITIONERS' MOTIONS ARE WITHOUT MERIT

There is no merit to the claims petitioners seek to advance; intervention should thus be denied. In *Marx v. Maddrey*, 106 F. Supp. 535 (E.D. N.C. 1952), petitioner moved to intervene and to set aside an order previously entered. The Court denied intervention on the ground that the arguments raised in opposition to the order were without merit.

Petitioners here do nothing more than reiterate arguments previously presented; they fail to raise any additional arguments not already heard at length and denied by this Court. To permit intervention and vacation of the decree so that these very same arguments can be heard again would impose an unwarranted burden on the parties and the Court.

In support of their contention that their claims should be heard, petitioners cite *United States v. Grinnell*, 384 U.S. 563 (1966), for the proposition that complete destruction of the monopoly power is the standard of relief in monopolization cases. However, the reliance on *Grinnell* is misplaced. Unlike the case at bar, *Grinnell*

was litigated to judgment; there was no consent decree. The authorities do not require complete divestiture where a consent decree, rather than a litigated judgment, is entered. The decree herein is designed to limit the powers of Blue Chip and to open up and increase competition in the stamp industry in California, while at the same time preserving the legitimate interests of the users of Blue Chip stamps. This is consistent with the principles embodied in the antitrust laws.

The consent judgment is indispensable to antitrust enforcement. The Government notes that seventy percent of their antitrust judgments are consent decrees. Such decrees result from negotiation, thus typically may provide something less than the full relief prayed for (and often something more than that which the Government could obtain after trial). Litigation that might proceed for many years is avoided by utilization of this procedure. Its legality is beyond question. In *Sam Fox Publishing Co., supra,* the Supreme Court observed that:

> "Apart from anything else, strong policy would strongly lead us to decline appellant's invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." 366 U.S. at 689.

As petitioners have not furnished the Court with anything beyond that which has already been carefully considered and rejected upon ordering entry of the con-

sent decree, there is nothing to be gained and much to be lost by vacating the decree.

Petitioners, when asked by the Court to present in substance a decree which would better serve the public were unable to do so. Their arguments are general and without economic substance. This Court has determined that it is essential that there be a viable non-franchised stamp company which can compete with the strong franchised ones, in order to permit small retail businesses in California to compete with large chain establishments. At the present time there is only one non-franchised stamp company in California, Blue Chip. The decree, among other matters, provides that one-half of Blue Chip's Southern California business must be sold to a purchaser who will operate on a non-franchised basis. This is the most practical way to increase competition in the retail trading stamp business that has been advanced in 3½ years, and petitioners' arguments against the decree are so shallow as to be devoid of merit.

Dated this 18th day of August, 1967.

/s/ WARREN J. FERGUSON
Warren J. Ferguson
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL No. 63-1552-WJF

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BLUE CHIP STAMP COMPANY, *et al.*,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Date: Thursday, December 15, 1966

[Argument.]

THE COURT: . . .

In deciding whether or not to decide to sign the proposed consent decree, I have to take as an established fact the allegations contained in the Complaint, and for the purposes of my discussion this afternoon I will accept as being conclusively proved the allegations of the Government concerning all of the defendants who are before the court.

I think the court has the power to enter a consent decree in the manner proposed, even though there may be two non-consenting defendants.

I think in this case if I were going to sign a decree I would make a finding, without any hesitation whatsoever, that there is no reason for any further delay. I think the matter should be settled promptly and effectively.

It isn't doing the administration of justice any good to continue this much longer. It isn't doing the economy of California any good to continue it any longer. It isn't helpful upon the emotional stability of the defendants to have the case continued any longer, and assuming, like I am assuming, that there is a violation or violations of the Sherman Act, then the matter should be corrected promptly.

It appears that the case, without any question, is a case of unusual quality. The economic ramifications are probably greater within a narrower geographical aspect, however, than any like case that has been presented before, because the case not only concerns a monopoly within the trading stamp industry in California, but whatever is done by this court will have a tremendous impact upon the economy of the State, not only the economy of the S & H and any trading stamp companies that want to come in but upon the entire retail, wholesale and consumer industry.

It is for the rollback provisions mainly that I am refusing to sign the decree. After listening to arguments for three days, after reading the briefs and studying them as well as I could, I am convinced that the rollback provisions would have such an impact upon the economy of the State that I would be performing a terrible injustice.

I do think, however, that there are possible alternatives to the rollback provisions, and I think it is incumbent upon me in any decree I sign, whether it be a consent decree or a decree after a trial — assuming I find there has been after a trial a violation of the Sherman Act as alleged — I must do something to insure, as much as *his*

humanly possible today, of future vigorous competition in the trading stamp industry, without impairing the economy of the State, particularly the grocery business.

In order to do so I have a dual problem. The problem is a complex dual one, and I can appreciate why we have had 16 months or 18 months, whatever it was, in negotiations by eminently qualified people.

I think the Government understands the grocery industry in California. I think they are attuned to the problems which are specific in California, and I don't think that anybody has any right to say — at least by what has been demonstrated to me so far — the Government is not concerned and aware.

The problem then requires two things. One, to establish a viable new company, a viable stamp business in California which will compete with S & H, and also at the same time eliminate the monopoly which Blue Chip presently has today.

In order to accomplish the viability I would recommend a decree which transfers not only to new company the assets, as set forth in the proposed decree, but also the name "Blue Chip".

I think that if the new company is going to be viable — and I will not have it hanging over my conscience if it doesn't prove viable — it is necessary that the name "Blue Chip" be transferred to the new company together with all the assets of Blue Chip. I think this transfer should be made immediately.

Now, I think it is vital and necessary that all of management, all of the employees, particularly management of

Blue Chip go to the new company right away. Of course, this is an individual choice of management, if they want to transfer. But I think the new company should be started immediately. I think Blue Chip should be dissolved immediately, and I think all management of Blue Chip should go to the new company. I think it is vital and imperative that the restraining orders which are contained in the proposed decree be included in any new consent decree.

Now, that is, the provisions concerning the fact that the new company shall — oh, with one exception. I can't conceive of any reason, any economic reason — I guess we are dealing in economics as much as we are dealing in law — that new company should be a non-profit corporation.

I have thought as much as I possibly could as to the reason, economic reason and legal reason, why it should be a non-profit corporation. If it is going to remain viable I think it has to be a competing business organization which remains healthy and enters the profit field.

So I won't sign a decree which says the new company has to be a non-profit one.

Now, I guess probably nobody has too much argument on what I have said so far.

Now we get to the point where we have to do something to make sure that new company opens up, permits an opening up of the stamp market in California, and how do you do that?

I don't think the rollback as proposed will accomplish anything except chaos. I have read the cases in which the

court uses predatory people going out and creating monopolies, all the harsh language that the Supreme Court has used to criticize conduct which creates monopolistic operations, and not only is the rollback provision inoperable, but I think it is too harsh.

Therefore, as an alternative I would propose something like this:

That at the end of a certain number of years, two or three, a sufficient period of time to insure that new company is viable, that new company shall present to the court a plan to sell within a geographical area one-third of its existing business.

The sale, I recognize the difficulties that this will present, but I think that a plan could be worked out by new company within that period of time whereby they will offer to sell to anybody who wants to buy within a specific geographical area one-third of the existing business of the new company, of the then existing business of the new company. The buyer will have to guarantee that they will continue a non-franchise stamp business. They will have to guarantee that they will remain in operation for a reasonable period of time regardless of the business consequences of their act. Then there should probably be a period of a year in which new company agrees it will not compete within the geographical area with the buyer, and then at the end of that year new company then agrees it will compete with the buyer within that geographical area.

It is entirely possible that nobody would ever buy under those terms and conditions, but if they don't buy, as Mr. Spivack has said, that is the problem in the market place.

If they do buy, then I think that the court has done something to open up the market with at least minimal injury to California's economy.

I think the agreement in regard to the repayment of the $1,500,000.00 has to be clarified, that it doesn't have to be paid back within six months, and I think the decree has to be more specific as to the redemption program between Blue Chip and new company, and in accord with the restraining orders as proposed and in accord with the type of enterprise that new company shall engage in, but I would urge that Blue Chip be dissolved forthwith, that new company begin operations forthwith, carry on the trading stamps known as Blue Chip.

Does anybody have any questions?

MR. ALSUP: Your Honor has made a very fine suggestion and we appreciate it.

MR. SPIVACK: Did I understand you suggest that one-third of the total business of Blue Chip be sold?

THE COURT: Within a geographical area, one-third of its total.

MR. SPIVACK: That total should be allocated in one geographical area?

THE COURT: Right.

MR. SPIVACK: In a geographical area which is sufficiently contiguous to an area in which Blue Chip can compete so that it can go in?

THE COURT: Yes.

MR. SPIVACK: As I understand from the geography of California, that would have to be a part of Southern California.

THE COURT: Well, I am throwing that out. I think a plan can be worked out. The details, I think, are going to be too onerous for me to try to decide that, but I think you have my idea, Mr. Spivack, as to how this is to be accomplished.

Is there too much opposition offhand that you can see to this?

MR. SPIVACK: Well, the problem was, your Honor, you remember originally at one time we were going to split it in two, one North and one South.

THE COURT: Well, within a period of three years, probably, I think new company with an entirely new outlook will be able to come up with a program, with this kind of plan, and the plan is going to have to be approved by the court. We are going to have to work out a program in which the offer is made to other companies, and there may have to be a bid procedure whereby sealed bids are taken for so much money, I don't know.

I would urge and recommend also further, however, that in addition that the arbitration program as set forth in the proposed decree be brought not only to include arbitration of that one aspect — I think the arbitration program is limited only to the paragraph which is self-contained — I think all aspects of this thing should be subject to arbitration so that any problems between Blue Chip and new company can be worked out within the business field.

One thing concerned me. I don't know whether or not the court should insist that a certain number of the directors of new company be approved by the Attorney-

General or approved by the Government. I was inclined seriously to consider the advisability of making at least one-third of the directors of new company approved by the Government. I won't insist on this, however, because it may not be necessary, and if it isn't necessary, it is not wise.

Anything else?

MR. LERMAN: Your Honor, did you have or include a suggestion as to who it is that would own the new company to be created?

THE COURT: No. I wish that I could, and I would like to be able to say something about that, and this is a problem that concerns Mr. Howland. It is a problem that concerns me.

I don't think it is going to make any difference. I don't think it is probably going to make any difference. If it is going to make any difference, then the furthest I would go in determining who would own new company would be to insist that the Attorney-General be able to approve at least one-third of the directors of that company. Like I say, I don't know whether it is necessary. If it isn't necessary — and I am talking about necessary and open, in order to open up the monopoly — then it would be unwise. But other than that I am not making any suggestion as to who would own new company.

Mr. Howland?

MR. HOWLAND: I have a question, your Honor. Does what your Honor has to say on the subject of a non-profit corporation, does that also apply to a co-op, a profit-making organization, the emoluments of which went to users?

THE COURT: The proposed decree says that the articles of the new corporation shall either be a non-profit corporation or else as approved by the plaintiff.

MR. HOWLAND: Yes.

THE COURT: Now, nobody has made any comment on the authority vested in the plaintiff by the decree. So if nobody is objecting, I am not making the objection.

There was violent objection by Mr. Lydick concerning the non-profit aspect of it, and I think he is validly justified in his vigorous argument against a non-profit organization.

Gentlemen, the court wishes to comment that your presentations, your demeanor and attitude have been entirely beneficial to the court, and all of you are a compliment to your clients and to the legal profession.

The court will be in recess.

(Whereupon, at 3:30 o'clock p.m., Thursday, December 15, 1966, an adjournment was taken.)

(Tr. Dec. 15, 1966, 401-412.)

INDEX

	Page
Statement	2
Argument	7
Conclusion	16

CITATIONS

Cases:

Alleghany Corp. v. *Kirby*, 344 F. 2d 571, certiorari dismissed, *sub nom. Holt* v. *Alleghany Corp.*, 384 U.S. 28 8

Associated Press v. *United States*, 326 U.S. 1 15

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 9

Silver v. *New York Stock Exchange*, 373 U.S. 341 15

Sutphen Estates v. *United States*, 342 U.S. 19 12

Swift and Co. v. *United States*, 276 U.S. 311 11

Tesseyman v. *Fisher*, 231 F. 2d 583 8

United States v. *Borden Co.*, 347 U.S. 514 10

United States v. *Grinnell Corp.*, 384 U.S. 563 13

United States v. *Radio Corporation of America*, 186 F. Supp. 776, appeal dismissed, 364 U.S. 518 12

Statutes and rules:

Sherman Act, Sections 1 and 2, 15 U.S.C. 1, 2 ..... 2, 15

F.R. Civ. P. 24(a) 6, 7, 10, 11

F.R. Civ. P. 24(b) 6, 11, 12

Miscellaneous:

2 Barron & Holtzoff, *Federal Practice and Procedure*, ¶ 594 (1961) 8

4 *Moore's Federal Practice*, 24.10(4) (1966) 12

286-163—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 820

THRIFTY SHOPPERS SCRIP CO., APPELLANT

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ET AL.

No. 849

WILLIAM TWYMAN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from orders of the district court (J.S. App. B)[1] denying appellants' motions to intervene in the proceedings below and to vacate a final judgment entered by consent on June 5, 1967. The consent judgment was entered in an antitrust action brought by the United States against the Blue Chip Stamp Company ("Blue Chip") and its stockholders (a group of retail stores).

1. *The government's suit.*

Blue Chip was organized in California in 1956 for the purpose of selling and redeeming trading stamps. Its incorporators and principal shareholders were retail merchants who would distribute the stamps to their customers (R. 93).

In December 1963, the United States filed a complaint in the United States District Court for the Central District of California, alleging that Blue Chip and its retailer-owners had attempted to monopolize and had monopolized the trading stamp business in California, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. The complaint charged that the defendants had entered into exclusive dealing arrangements, had boycotted other retailers and had fixed prices, and thereby had obtained a monopoly of the trading stamp business in California. The government sought divestiture by each of the defendant retailers of its stock ownership in Blue Chip and an injunction against their controlling the company

[1] Appendices A, B, and C, of the respective jurisdictional statements, are identical.

and regulating the rate of issuance of Blue Chip stamps (R. 14).

2. *The consent decrees*

Extended negotiations between the parties led to the successive filing with the court of three proposed consent decrees, the last of which the court entered. The government followed its customary practice of providing that, to give interested parties an opportunity to be heard, the decree could not be entered for 30 days, during which the government might withdraw its consent (J.S. App. 2-3).

The first decree, filed on July 22, 1966, was not consented to by two of the defendants. Objections thereto were filed by those two defendants and by the State of California and two trade associations of grocers. As a result, the government withdrew its consent (J.S. App. 3).

On October 28, 1966, a second decree, to which the same two defendants again did not consent, was lodged with the court. The same persons who had objected to the prior decree and a trading stamp company opposed this one, and after hearing the district court stated that it would not sign the decree. The court indicated certain provisions it regarded as essential to an acceptable decree (J.S. App. 3).

On April 28, 1967, a third decree, which incorporated the provisions the district court deemed essential, was filed. All the defendants consented to this decree and the previous objectors (other than the trading stamp company) deemed it satisfactory. The present appellants (as well as two trading stamp com-

parties) filed briefs *amicus curiae* opposing the decree. After a hearing at which the objectors were heard, the district court on June 5, 1967 approved and entered the decree (J.S. App. C). (J.S. App. 3–4.)

The decree enjoins the retailer defendants from combining or conspiring to restrain or from monopolizing or attempting to monopolize the trading stamp business in California (J.S. App. 25). It specifically prohibits agreements among users of stamps which prevent the use of any particular trading stamp service or which limit the rate of issuance of trading stamps by the retailer to his customers (J.S. App. 26). Blue Chip is directed within 60 days to submit for court approval a reorganization plan under which the defendants will retain 45 percent of the stock of the new company; another 45 percent will be offered to the public (nearly all of which is first to be made available to users of Blue Chip stamps other than the defendants, in proportion to their use); and 10 percent will be reserved for the management of the new company (J.S. App. 26–27; 40–44). The shares in the reorganized company to be retained by the retailer defendants cannot be voted by them, but only by an independent third person; and such defendants are barred, for 10 years, from acquiring any additional shares in the company and from acting as officers or directors thereof (J.S. App. 32). Blue Chip and its successor company are enjoined from refusing to provide trading stamp service, or limiting such service, because of (1) the presence in the same locality of a competing stamp service, (2) the rate of issue of

stamps by the user to his customers or (3) the user's employment of any other stamp service (J.S. 31). If Blue Chip is not thus reorganized, the judgment requires it, within 15 months of such failure of reorganization, to divest all of its assets and good will and to dissolve (J.S. App. 27–28). Within 30 months of reorganization, the new company is required to submit a plan under which it will offer to sell one-third of its then existing business in the State of California (J.S. App. 32–34).[2]

3. *The Motions to Intervene*

Appellant in No. 820, Thrifty Shoppers Scrip Company ("Thrifty"), is engaged in the trading stamp business in California. On April 25, 1967—three days before the third consent decree was filed with the court—it instituted a private antitrust action against Blue Chip and its retailer-shareholders, charging the identical violation alleged in the government's complaint. Its complaint seeks divestiture by the retailers of all their stock in Blue Chip, and an injunction against their use of Blue Chip trading stamps. As noted, Thrifty participated *amicus* in opposing the decree. On July 12, 1967, 37 days after the district

[2] The prospective purchaser of such business must be approved by the court, and the business to be sold must be located in a contiguous area of Southern California. The new company is to be prohibited for one year from selling its stamps in competition with the purchaser in that area, but thereafter will be required to compete there with the purchaser. The purchaser will be bound by the injunctive provisions in the decree directed against Blue Chip and its successor (J.S. App. 33–34).

court entered it, Thrifty filed a motion to intervene, and for vacation of the decree (J.S. App. 4; R. 2739).

Appellants in No. 849 are 1,775 independent California service station operators, who have instituted a similar private treble-damage action against Blue Chip and defendant retailers. They also participated *amicus* in opposition to the consent decree. On June 15, 1967, ten days after the court entered the decree, they moved to intervene and to vacate the judgment (J.S. App. 4–5; R. 2694, 2697).

After hearing, the district court denied the motions (J.S. App. B; R. 3065).[1] Noting that neither motion was timely, the court ruled that the appellants had not shown any unusual circumstances warranting the granting of untimely motions (J.S. App. A, pp. 6–12). The court further held that, in any event, the appellants had not shown that they had an "interest relating to the property or transaction which is the subject of the action" that would justify intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure (J.S. App. A, pp. 12–13). The court also denied permissive intervention under Rule 24(b) (J.S. App. 14–16). Finally, the court ruled that appellants' request to vacate the consent judgment had "no merit" (J.S. App. 16). It stated (*ibid.*) that appellants "do nothing more than reiterate arguments previously presented; they fail to raise any additional arguments not already heard at length and denied by this Court."

[1] The Court also denied motions to intervene and vacate by Raley's, Inc., a nondefendant stockholder of Blue Chip. Raley's has not pursued its appeal to this Court. (Stipulation and Order Dismissing Appeal dated November 13, 1967.)

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court correctly denied intervention as of right, did not abuse its discretion in denying permissive intervention, and properly refused to vacate the consent judgment.

1. Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that "[u]pon timely application" intervention shall be allowed

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The appellants did not satisfy two of these requirements for intervention as of right: (a) their applications to intervene were not timely; (b) the disposition of the government antitrust suit through the consent judgment did not "as a practical matter impair or impede" their "ability to protect" their interest in the subject matter of that suit.

(a) Although the appellants were fully aware of the terms of the third proposed consent judgment and actively opposed it as *amici curiae* in briefs and oral argument, they waited until 37 and 10 days, respectively, after the district court had entered the judgment before moving to intervene. The general rule is that intervention sought after judgment is untimely

unless a strong showing is made that such belated participation is necessary to protect a right that otherwise could not be safeguarded. 2 Barron & Holtzoff, *Federal Practice and Procedure*, ¶ 594 (1961). Appellants made no such showing here. They had ample opportunity to seek intervention during the 38 days that the proposed consent decree was on file with the court; instead, they elected to present their opposition thereto through participation as *amici*. Moreover, appellants were aware that since all the parties to the case had agreed to the judgment, there would be no one to appeal if the court entered it; yet they chose not to seek timely intervention to protect their own right to appeal.

The determination whether a particular application to intervene is timely rests primarily within the discretion of the district court. *Tesseyman* v. *Fisher*, 231 F. 2d 583 (C.A. 9); *Alleghany Corp.* v. *Kirby*, 344 F. 2d 571 (C.A. 2), certiorari dismissed *sub. nom. Holt* v. *Alleghany Corp.*, 384 U.S. 28. Appellants have not shown that the district court abused its discretion in viewing their applications to intervene as untimely—particularly so since the purpose of the intervention was to vacate the judgment and, as the court pointed out (J.S. App. 16), the appellants did "nothing more than reiterate arguments previously presented; they

fail[ed] to raise any additional arguments not already heard at length and denied by this Court."[4]

(b) Appellants also failed to show that the consent judgment that terminated the government antitrust case "as a practical matter impair[ed] or impede[d]" their "ability to protect" their interest in the subject matter of that suit. The interest they sought to protect by intervention was the successful prosecution of private antitrust suits they had filed charging the defendants in the government case with the same violations. Since the consent judgment expressly states that it was entered "without trial or adjudication of any issue of fact or law herein" (J.S. App. 23–24), it neither determined whether any of the defendants had violated the antitrust laws nor decided what relief would be appropriate if such violations were found. If the appellants in their suits can establish (1) that the defendants have committed the violations charged and (2) that relief either broader or different than that provided by the consent judgment is necessary and appropriate to vindicate appellants' rights, then

[4] Appellants' reliance (J.S. No. 820, p. 20; J.S. No. 849, pp. 11, 25–27) upon *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, to support their claim that they timely sought intervention, is misplaced. All three of the applications for intervention which this Court there held had been improperly denied were filed *before* the district court entered its decree. The decree was entered on June 24, 1965 (Record on appeal, Nos. 4, 5, and 24, 1966 Term, p. 2172). The applications to intervene were filed on July 22, 1964 (*id.* p. 68), October 7, 1964 (*id.* p. 69) and June 22, 1965 (*id.* p. 2078).

they are entitled to such relief. Were the district court to refuse it, such ruling could be reversed on appeal.

Thus, the fact that appellant Thrifty's complaint seeks the same relief that the government sought—relief that the consent judgment does not fully provide (see *infra*, pp. 13–16)—will not as a practical matter preclude Thrifty from obtaining such relief if it can demonstrate the need therefore. "These private and public actions were designed to be cumulative, not mutually exclusive" (*United States* v. *Borden Co.*, 347 U.S. 514, 518). The fact that a consent judgment in a government antitrust suit provides lesser or different relief than that sought in a private suit based upon the same alleged violations does not entitle the private plaintiff to intervene as of right in the government suit to oppose the consent judgment. For if it did, the large number of private suits that ofen follow the initiation of a government suit would mean that there would be a substantial amount of intervention by such private plaintiffs in government antitrust litigation. This, in turn, would frequently make it virtually impossible for the original parties to the government suit to settle the case on terms that the government believes would better serve the public interest than bringing the case to trial.

Nor can appellants predicate any right to intervention on the claim that such participation was necessary to protect the public interest. It is doubtful that the "interest relating to the property or transaction which is the subject of the action" that Rule 24(a)(2) is designed to protect through intervention,

covers a general public interest in the proper enforcement of the laws. On the contrary, it appears to refer to the intervenor's private or property interest.

In any event, any such interest on the part of the appellants has been "adequately represented by existing parties" (Rule 24(a)(2)), namely, by the Attorney General. For the Attorney General has the duty to enforce the antitrust laws by bringing suits to restrain violations of such laws, and his enforcement authority includes the right to settle such suits on terms he deems appropriate. Cf. *Swift and Co.* v. *United States*, 276 U.S. 311, 331–332. In the present case, through his representatives in the Department of Justice, he conducted negotiations for a consent judgment for more than two years; three different decrees were filed with the court; and the decree ultimately entered met the objections of the State of California and the two trade associations that had opposed the earlier proposals (R. 2547, 2593). The government was fully justified, in working out the final decree with the parties, to give effect to the stated views of the district judge as to the changes he deemed necessary before he would approve any consent judgment; indeed, its failure to do so would have subjected it to valid criticism.

2. Rule 24(b) provides that upon timely application, permissive intervention may be granted

> when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The district court did not abuse its discretion in denying permissive intervention. *First*, the untimeliness of the applications to intervene, which supports the denial of intervention as of right (see *supra*, pp. 7-8), equally justifies the denial of permissive intervention. *Second*, since appellants have an entirely adequate remedy in their pending private antitrust suits (*supra*, pp. 9-10), there was no occasion to permit them belatedly to intervene in this case. *Third*, appellants raised no new points, but merely reiterated the arguments they previously had made in their *amici* submissions, and which the court had considered and rejected (J.S. App. 16). *Fourth*, permitting intervention would have "delay[ed] or prejudice[d] the adjudication of the rights of the original parties," contrary to the intendment of Rule 24(b), by (1) postponing implementation of the consent decree, (2) perpetuating the restraints the decree is designed to correct, and (3) possibly forcing the parties to bear the burden and expense of a long and difficult trial they do not want. See *United States* v. *Radio Corporation of America*, 186 F. Supp. 776, 777 (E.D. Pa.), appeal dismissed, 364 U.S. 518. Permissive intervention was properly denied. Cf. *Sutphen Estates* v. *United States*, 342 U.S. 19, 23; 4 *Moore's Federal Practice*, 24.10(4) at 62 (1966 ed.).

3. Finally, there is no merit to appellants' contention (J.S. No. 820, pp. 17, 21-27; J.S. No. 849, pp. 16-25) that the consent judgment provides inadequate relief. The district court therefore properly denied appellants' motions to vacate that judgment—

motions which rested on the same grounds upon which they here challenge the judgment.

Appellants' basic contention is that, because the judgment neither dissolves Blue Chip nor requires complete divestiture of the retailer-stockholders' stock interest in the company, it does not satisfy the standard announced in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577, that "adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." But this standard does not automatically call for dissolution in every monopolization case. That is particularly so where, as here, there has been no trial and no adjudication of violation and, at the same time, there has been ample exploration of the impact of various forms of relief on the affected persons. The consent judgment in this case will effectively dissipate the defendants' monopoly power, while at the same time retaining certain beneficial effects of Blue Chip's operations and protecting the interests of small retailers who might be seriously injured if Blue Chip were completely dissolved.

(a) Blue Chip basically is a joint venture of many retailers of varying size, which achieved monopoly power as a result of the restrictive conditions it imposed on its members which effectively precluded other trading stamp companies from entering the market (see *supra*, p. 2). The decree specifically prohibits these restrictive practices and insures all re-

tailers both access to Blue Chip stamps and the right to acquire stock in the company (see *supra*, pp. 4–5). Once those steps have been accomplished, the large share of the market embraced by the Blue Chip cooperative trading stamp program has a far less significant anticompetitive effect.

Moreover, the decree is adequate to insure competing trading stamp companies an adequate opportunity to enter the California market or to regain market shares they had lost to Blue Chip as a result of the latter's anticompetitive practices. The decree not only will reduce the size of Blue Chip by one third in about two and one-half years, but also enjoins any arrangement under which Blue Chip licensees deal exclusively in Blue Chip stamps. It also creates an opportunity for a new stamp company to enter the market by acquiring part of Blue Chip's business.

Appellants argue (J.S. No. 820, pp. 25–26; J.S. No. 849, pp. 22, 24) that the wide ownership of Blue Chip stock that will result from the decree will ensure that most California retailers will continue to use Blue Chip stamps. This contention is wholly speculative and seems unrealistic in the light of the facts in the record. The effect that a particular retailer's use of Blue Chip stamps is likely to have upon Blue Chip's profits and dividends is so miniscule that it is most unlikely that a retailer's stock ownership in the company would induce it to continue to use Blue Chip stamps if it thought that another kind or brand of stamp was cheaper or better, or that it would be preferable to avoid the expense of stamps altogether. Indeed, four of the grocery chains

that own stock in Blue Chip have dropped its stamps in favor of some other brand or none at all (R. 3007).

(b) Even in litigated antitrust cases where the defendants possess monopoly power but the principal thrust of the complaint is against the restrictive practices by which such power was acquired or maintained, it is not unusual if the combination accomplishes some socially desirable ends, for the judgment to correct the violation by prohibiting the restrictive practices rather than breaking-up the combination. *E.g., Associated Press* v. *United States*, 326 U.S. 1; *Silver* v. *New York Stock Exchange*, 373 U.S. 341.[3] Blue Chip provides important service to smaller retailers so long as it offers its stamps on a non-exclusive basis, because most independent trading stamp companies will make their stamps available only under exclusive franchises in given marketing areas (Tr. 168–169). This necessarily limits the access of smaller retailers to trading stamp programs, and may place them at a serious disadvantage as against their franchised competitors.

The government consented to this decree only because it was satisfied that it would adequately dissipate the primary anticompetitive effects of the monopolistic scheme. Once the court was similarly persuaded, it was proper for it to consider the interests of those small retailers who might continue to use Blue Chip stamps and who would suffer grievous harm if the company were so dismembered that the stamps themselves lost their attractiveness.

[3] Although those cases involved violations of Section 1 rather than Section 2, this fact does not vitiate the analysis in the text.

In the context of a complex case involving many conflicting considerations, the district court adopted a decree which we believe effectively dissipates the major evils of the original scheme without sacrificing certain beneficial aspects of the program and without prejudicing the interests of many small retailers whose involvement in the original illegal aspects of the scheme was at most peripheral.

CONCLUSION

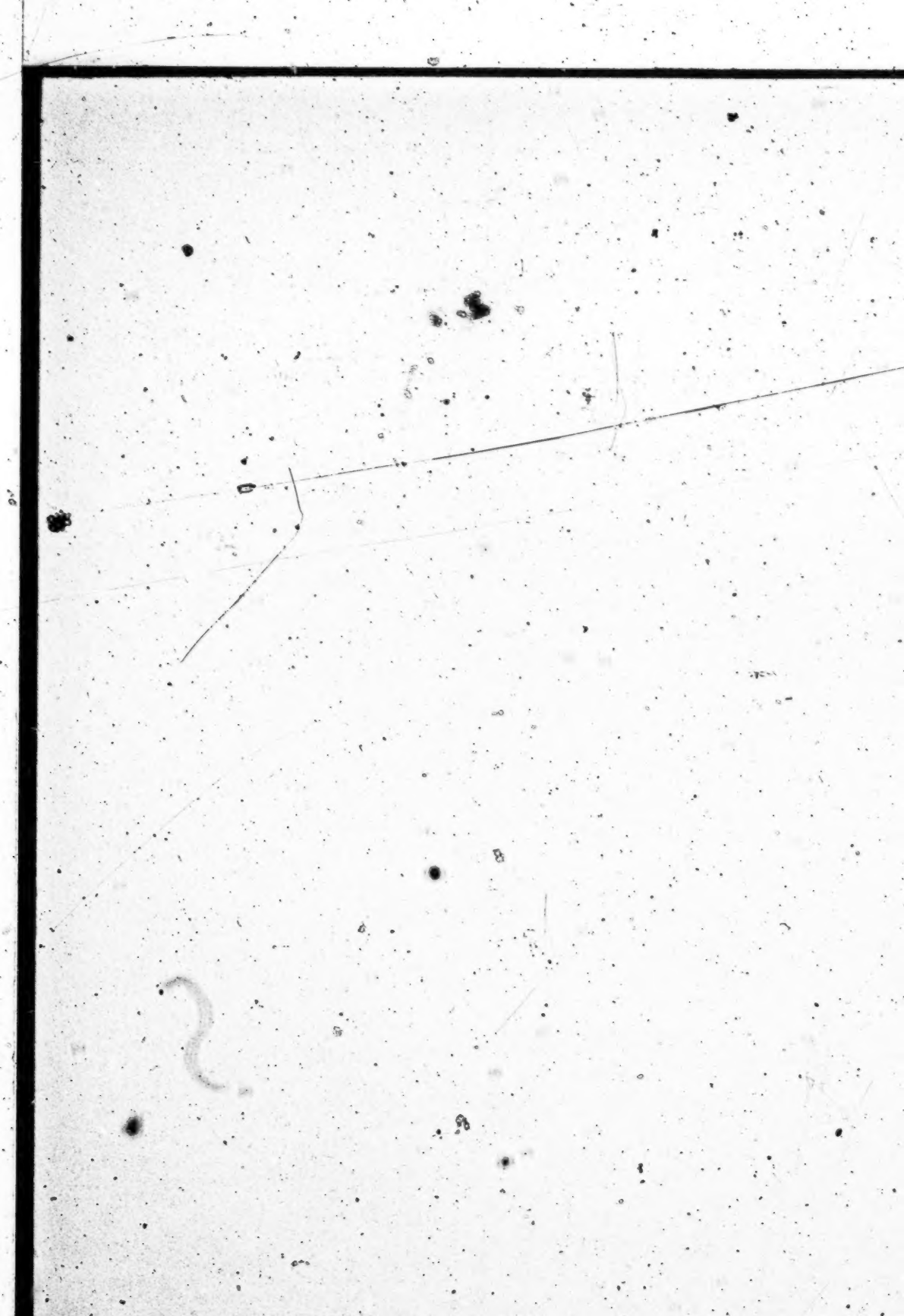
The orders of the district court denying appellants' motions to intervene and motions to vacate should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.
GREGORY B. HOVENDON,
RICHARD A. WEGMAN,
Attorneys.

JANUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968



SUBJECT INDEX

	Page
The Decree Entered Below Will not Dissipate the Monopoly	3
Blue Chip Achieved Monopoly Power by a Joint Venture Which the Decree Does Not Dissolve	6
There Is No Basis for the Distinction Drawn Below Between Franchised and Non-Franchised Stamp Companies	7
The Possibility That One-Third of Blue Chip's Business May Be Sold Will Not Dissipate the Monopoly	8
Thrifty Shoppers Has Such an "Interest" as to Entitle It to Intervene	11
Thrifty Shoppers' Motion to Intervene Was Timely	12
Conclusion	13
Certificate of Counsel	14

TABLE OF AUTHORITIES CITED

CASES — Pages

Associated Press v. United States, 326 U.S. 1 (1945) 7

Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 10, 11

Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) 12

Purity Stores, Inc., v. Blue Chip Stamp Company, 1963 Trade Cas. ¶ 70,895 (N.D. Cal. 1963) 9

Sam Fox Publishing Co. v. United States, 366 U.S. 683 12
Schine Chain Theatres v. United States, 334 U.S. 110 (1948) .. 6
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 7

United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 6
United States v. E. I. duPont de Nemours & Co., 366 U.S. 316 (1961) 3
United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 5

STATUTES

Federal Rules of Civil Procedure, Rule 24(a) 12

TEXT

Donald F. Turner, Address before The Association of the Bar of the City of New York, Dec. 13, 1967 (ATRR No. 336, Dec. 19, 1967, X 1, 2) 4

No. 820

In the Supreme Court of the United States

OCTOBER TERM, 1967

THRIFTY SHOPPERS SCRIP CO., *Appellant*

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ALEXANDER'S MARKETS, LUCKY STORES, INC., MARKET BASKET, PURITY STORES, INC., RALPHS GROCERY COMPANY, SAFEWAY STORES, INCORPORATED, THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., and VON'S GROCERY CO.

On Appeal from the United States District Court for the Central District of California

---

Petition for Rehearing of Appellant Thrifty Shopper Scrip Co.

Appellant Thrifty Shoppers Scrip Co. ("Thrifty Shoppers") submits this petition for rehearing of the order of this Court, dated January 15, 1968, affirming the judgment of the district court. As grounds for this petition, it states:

1. Thrifty Shoppers did not submit its reply brief to the motions of the United States and of defendants below

prior to the Court's order affirming the judgment of the district court for the following reason:

On December 26, 1967, the undersigned, David B. Gold, counsel for Thrifty Shoppers, called the Clerk of this Court by telephone from San Francisco, California, to make inquiry of the time within which he must file a brief opposing any motions which might be filed by the United States and by defendants below to dismiss or affirm. The undersigned had been notified that the time within which the United States and defendant appellees would have to file motions had been extended by the Court to January 2, 1968. In this telephone conversation, the Clerk of the Court stated that the jurisdictional statements and the motions and reply briefs would not be distributed to the Justices prior to Tuesday, January 16, 1968. In reliance thereon, the undersigned proceeded with the preparation and printing of Thrifty Shoppers' brief opposing the motions to dismiss or affirm so that the brief would be filed with this Court on January 16, 1968.

2. The motion of the United States to affirm the judgment and the motion of the defendants below to dismiss the appeals of appellants or to affirm the order of the district court denying appellants' motion to intervene and to vacate the final judgment should be denied for the reasons:

a. The decree entered below will not dissipate the monopoly.

b. Blue Chip achieved monopoly power by a joint venture which the decree does not dissolve.

c. The trial judge failed to comply with minimal procedural due process in making economic determinations on disputed facts and in formulating provisions which he regarded essential to any consent decree to be entered by him. In doing so, he acted without the benefit of evidentiary

hearings, including testimony and the right of cross-examination.

d. Thrifty Shoppers has such an interest as to entitle it to intervene and its motion to intervene was timely.

The Decree Entered Below Will Not Dissipate the Monopoly.

Contrary to the assertions of appellees, the facts of record demonstrate that the decree entered by the district court is patently inadequate.* It will not bring an end to the unlawful combination entered into by large chain retailers in California nor will it dissipate the monopoly they have achieved in the trading stamp industry in that state through their joint venture in Blue Chip. Not only does the decree permit the retailer defendants (a) to retain more than 40 percent of the stock ownership of Blue Chip and (b) to continue to make use of Blue Chip stamps in their stores but it expands the existing monopoly by affording other retailers who have been using Blue Chip stamps the opportunity to acquire approximately 45 percent of the company's stock, thereby tying additional thousands of California merchants to Blue Chip.

The fact that this judgment was entered by consent does not constitute a basis for failing to award relief minimally requisite to redress the antitrust violation. In that connection, the views of the Department of Justice with respect to the standards which should be met by a consent decree have

*Defendant appellees contend that the framing of antitrust decrees is largely a matter for the discretion of the trial court (Def. Br. pp. 23-24). The fact is that this Court does not limit itself to a narrow review of the remedies fashioned below in antitrust cases. In *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 323 (1961), the Court "made it clear that a decree formulated by a District Court is not 'subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree.'"

been set forth by the Assistant Attorney General in charge of the Antitrust Division as follows:

> " * * * I believe the Government normally should resolutely refrain from settling for anything substantially less than what it believes it would be entitled to secure after an adjudication in its favor. To do otherwise would be to eradicate much of the enforcement gain that comes from the negotiation of consent decrees. For if the Government indicated a willingness to trade off significant decree provisions for relief from the burdens of litigation, virtually all decrees would quickly sink to a much lower level of effective relief."*

The situations in which the Assistant Attorney General considered that the Government should settle "for less than the full range of relief that litigation might conceivably secure" were stated to be those in which the Government has serious doubts about the legal theory of the case and those in which the gain from what is given up would not outweigh the cost and risk of full litigation and the case is not an important one. Neither situation is present here. Government counsel, in discussing this case with the court in the course of consent proceedings, said that "a very important crime has been committed here" (Tr. Dec. 13, 1966, p. 16); that "this is a boycott, an illegal monopoly. It is very hard to come in and fight with a company that has already got 80 percent of the business, that is owned by your best customers. If you want to do business with these supermarkets you have got to break the boycott, they own the monopoly, a monopoly in which there is no competition," (*id.* p. 30); and "[H]ere we have in existence a monopoly power illegally acquired. It is by every definition,

---

*Address, Donald F. Turner, before The Association of the Bar of the City of New York, Dec. 13, 1967 (ATRR No. 336, Dec. 19, 1967, X 1,2).

by every case illegal. Your Honor must enjoin" (*id.* p. 69).* The lower court said that "[I]t appears that the case, without any question, is a case of unusual quality. The economic ramifications are probably greater within a narrower geographical aspect, however, than any like case that has been presented before * * * " (Tr. Dec. 15, 1966, p. 402, quoted in Def. Br. at p. 40a).

That any decree entered by the lower court would be inadequate became inevitable when in the course of argument by this *amicus curiae* prior to entry of the decree the trial judge reiterated the view that the grocery industry in California was more important than the trading stamp industry and that his efforts to preserve competition in trading stamps would not be at the risk of the grocery industry (Tr. June 5, 1967, pp. 46-47). In choosing to sacrifice competition in one industry to secure purported benefits in another, the trial court made a legislative decision which was "beyond the ordinary limits of judicial competence." *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963). The Government emphasized this precise point to the trial judge at hearings on the earlier consent decree filed on October 28, 1966, when in criticising a proposal of the State of California and others for settlement of the case Government counsel said:

> "[T]hey are saying that 'if there is an effect in the grocery market on competition because of dissipation of a monopoly in trading stamps, forget about a monopoly in the trading stamp business because the grocery business is more important.'

*These statements were made by Government counsel prior to the announcement by the trial judge, on December 15, 1966, of the provisions he considered should be included in any judgment entered by him (Tr. Dec. 15, 1966, pp. 404-408, quoted in Def. Br. at pp. 41a-44a). These provisions constituted the basis for the decree ultimately entered.

"First the answer to that, your Honor, the answer to all those cases is that that is a legislative decision. It is up to the legislature to say that competition in one industry is more important than another * * *." (Tr. Dec. 13, 1966, p. 47)

Blue Chip Achieved Monopoly Power by a Joint Venture Which the Decree Does Not Dissolve.

A fundamental error in the Government's position on appeal is its contention that Blue Chip "achieved monopoly power as a result of the restrictive conditions it imposed on its members which effectively precluded other trading stamp companies from entering the market" and that once those restrictions have been removed and retailers given "both access to Blue Chip stamps and the right to acquire stock in the company" then "the large share of the market embraced by the Blue Chip co-operative trading stamp program has a far less significant anticompetitive effect" (Gov't Br. pp. 13-14). The fact is that the monopoly position of Blue Chip was the direct product of an unlawful joint venture engaged in by the creation and operation of Blue Chip by eight of the largest retail grocery chains in California (which in 1963 were doing more than $1,800,000,000 business) (R. 847) and the largest chain of retail pharmacies in the state. So long as the structure of Blue Chip remains such that the leading retail grocery chains in California are permitted to own its stock and to issue its stamps, there can be no dissipation of the monopoly. "Dissolution of the combination will be ordered where the creation of the combination is itself the violation." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944). Accordingly, "in this type of case [the Court] start[s] from the premise that an injunction against future violations is not adequate to protect the public interest." *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948).

In *Associated Press v. United States*, 326 U.S. 1 (1945) and in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), cited by the Government (Gov't Br. p. 15), specific practices of the defendants were attacked, and the Court did not consider dissolution of those organizations. In the instant case, on the contrary, the thrust of the complaint was directed at the conspiracy by which Blue Chip was organized and operated by eight defendant supermarket chains doing approximately 51 percent of all chain grocery sales in the Los Angeles area and approximately 37 percent of such sales in California and by the largest chain of [illegible]macies in California (R. 4). The relief sought by the Government's complaint included the prayer that each of the defendant retailers be required to divest itself of all of its stock in Blue Chip and that each of such defendants be required to cease issuing Blue Chip stamps to its customers. Thrifty Shoppers does not seek the dissolution or dismemberment of Blue Chip, as the Government states in its brief (Gov't Br. p. 13). The relief Thrifty Shoppers seeks is that which the Government sought in its complaint and the only remedy that can be effective: the divorce of Blue Chip from the retailer defendants so that Thrifty Shoppers and other trading stamp companies will have a realistic opportunity to compete.

There Is No Basis for the Distinction Drawn Below Between Franchised and Non-Franchised Stamp Companies.

Appellees place great reliance upon the insistence of the lower court that the viability of Blue Chip be insured because that company makes available its trading stamps on a non-franchised basis. There is no legal or economic justifica-

tion for differentiating between "franchised" stamps and "non-franchised" stamps. The Government made no such distinction, alleging in its complaint that the defendants have conspired to restrain trade and commerce in "the trading stamp business" and have monopolized "the trading stamp business", not "the *non-franchised* trading stamp business." Defendant appellees have recognized in their brief that there is no such distinction between franchised and non-franchised companies in asserting that *all* trading stamp companies will "have every incentive and opportunity to compete for Blue Chip's patrons" (Def. Br. p. 14).

There is no factual basis in the record for the concern expressed by the lower court for the non-franchised Blue Chip trading stamp. If some retail merchants in California desire a non-franchised trading stamp, there is no reason to doubt that some company will provide that service to them. If other retailers want a franchised trading stamp, still other companies will provide that kind of service. The appropriate place for the decision to be made as to what trading stamps California retailers issue and what stamps California housewives save is in the market place.

The Possibility That One-Third of Blue Chip's Business May Be Sold Will Not Dissipate the Monopoly.

In the face of the continuing tie of defendant retailers and other stamp users to Blue Chip, appellees urge that reliance be placed on Sec. IX of the final judgment which provides that within 30 months after completion of Blue Chip's reorganization (and at this time that reorganization has not been accomplished) the company shall present a plan to the

court for the sale of one-third of Blue Chip's then existing trading stamp business in California, all such business to be located within a contiguous geographic area within Southern California. Even if this business should be sold—and that there will be a sale is far from certain—the reduction in Blue Chip's size would be concentrated in a single geographic area, and there would be absolutely no reduction in Blue Chip's volume of business in the balance of the territory in which Blue Chip operates: all of Northern California* and that part of Southern California in which none of Blue Chip's business will be sold and in which Blue Chip does approximately one-third of its total business. It should further be noted that under the decree Blue Chip would merely be required to submit a *plan* under which it would *offer* to sell one-third of its business. An overwhelming number of the customers "purchased" from Blue Chip would be Blue Chip's stockholder-customers, who would be neither obligated nor inclined to do business with the purchaser. Those that did would be unlikely to continue as customers of the purchaser for more than a year, after which they would be free under the decree to return to Blue Chip. As the trial judge candidly stated: "It is entirely possible that nobody would ever buy under those terms and conditions . . . " (Tr. Dec. 15, 1966, p. 407, quoted in Def. Br. App. D p. 43a).

Defendant appellees seek to establish that in fact a sale will be made by quoting *in extenso* a colloquy between the

---

*In Purity Stores, Inc., v. Blue Chip Stamp Company, 1963 Trade Cas. ¶ 70,895 (N.D. Cal. 1963), the court found that Blue Chip was the dominant trading stamp company in Northern California, "having in excess of 75% of the trading stamp business." (Finding of Fact No. 7).

trial judge and Mr. Spivack, Government counsel (Def. Br. pp. 14-16). Mr. Spivack informed the court, on questioning, that the Department of Justice had made no study to determine if it were realistic to believe that one-third of Blue Chip's business could be sold in the light of the extremely difficult competitive conditions the purchaser would face, particularly one year after the sale when Blue Chip would re-enter the market in which the sale would be made. Mr. Spivack went on to say that Gold Bond wanted to buy this business and if that were so "probably somebody else will be willing to buy it."

The foregoing exchange exemplifies the basis upon which the trial judge reached his determination as to the provisions which should be incorporated into the decree in this large and important case and the judge's economic conclusions underlying such provisions—such as his belief that it was necessary to include provisions to protect the retail grocery business and to preserve the non-franchised stamp business. There were no evidentiary hearings, no testimony of witnesses and no opportunity to cross-examine the trial judge's economic conclusions on which the decree was based, though the participants were sharply at variance as to the validity of those economic conclusions.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967), this Court held that "the 'existing parties' have fallen far short of representing its [Cascade's] interest," although in the relief proceedings hearings had been held in which the proposed divestiture plan was supported by testimony. Under *Cascade*, the deficiencies present in this case *a fortiori* entitle appellant to intervene as of right.* When, as here, the trial judge has formulated provi-

*In *Cascade*, the Government, though opposing intervention, said that "[t]he decree in this case is not technically a consent judgment; but it shares important characteristics with one. Frequently, after

sions which he regards as essential to any consent decree he will enter, minimal procedural due process requires that the disputed economic facts underlying those provisions should be the subject of evidentiary hearings which would include the right of cross-examination of such facts.

Thrifty Shoppers Has Such an "Interest" as to Entitle It to Intervene.

Both the defendants and the Government argue, on the one hand, that Thrifty Shoppers has no "interest" in the subject matter of the action and, on the other hand, that it may adequately protect said interest because it has instituted a private treble damage action based on the charges in the complaint herein.

There can be no real question that Thrifty Shoppers has a substantial interest in the outcome of this suit. As a competitor, its very survival may depend upon the terms of the decree entered herein. The complaint of the Government alleged that "[T]rading stamp companies which have competed with or which desire to compete with Blue Chip in the trading stamp business in California have been denied the opportunity to do so in a competitive market" (R. 13-14).

A holding that a competitor should be barred from intervening because it has the right to commence a private action based on the same violation of law would prevent any competitor from ever intervening in an antitrust action. Such a conclusion would be utterly inconsistent with *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra,* in which Cascade, a distributor of natural gas in Oregon and Wash-

---

the issue of violation has been litigated and determined, the parties in a government antitrust proceeding will, as here, negotiate a decree, which is then entered by stipulation" (Gov't Br. filed Dec. 29, 1966, p. 34). This Court sustained the appeals of the parties seeking intervention, holding that they were entitled to intervene as of right and requiring *de novo* hearings on divestiture.

ington, was permitted to intervene even though it presumably could have maintained a private action for damages as well as for injunctive relief as a result of the unlawful merger.

This Court has had frequent occasion to express its insistence upon preservation of the rights of the private treble damage plaintiff, e.g., *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965) in which the Court pointed out that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Certainly, unless this decree is set aside, this appellant cannot expect to secure more adequate relief in its private case than the Government has secured, particularly in the same district court. Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 694.

Private treble damage actions, an important adjunct to the enforcement of the antitrust laws, will suffer serious impairment as a means of redressing antitrust violations if those situated such as is this appellant are denied the right to intervene to secure adequate relief in Government actions. Moreover, this conclusion is in all respects consonant with the amended Rule 24(a); unless appellant is permitted to intervene "the disposition of the action may as a practical matter impair his ability to protect" his interest in the action.

Thrifty Shoppers' Motion to Intervene Was Timely.

The fact that Thrifty Shoppers did not formally move for intervention until after entry of the judgment below should not impair its right to intervene. The position the Government appears to be taking is that, had Thrifty Shoppers formally moved for intervention, rather than

for permission to file a brief *amicus curiae,* its application would have been timely. Since Thrifty Shoppers was, as the district court noted in its opinion and as the defendant and Government appellees have emphasized in their briefs, "given every opportunity to be heard" the only purpose of a prior intervention would have been to preserve its right to appeal. This right would have been academic had the arguments made by Thrifty Shoppers and other *amici* been successful. Intervention here accords with the orderly administration of justice. Appellant's motion to intervene dealt with a real, and not merely theoretical, purpose; it was made to set aside an inadequate decree and, failing that, to appeal to this Court. An application for intervention by Thrifty Shoppers would undoubtedly have been met with the response by the Government and a decision by the court that, since Thrifty Shoppers was being permitted to present its views *amicus curiae,* such application was at that time premature.

CONCLUSION

For the reasons stated, this petition for rehearing should be granted. The order affirming the judgment of the district court should be set aside and probable jurisdiction should be noted.

Respectfully submitted,

DAVID B. GOLD
Counsel for Appellant
Thrifty Shoppers Scrip Co.

January, 1968

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing of the order of this Court affirming the judgment of the district court is presented in good faith and not for delay.

DAVID B. GOLD

Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

THRIFTY SHOPPERS SCRIP CO. *v.* UNITED STATES ET AL.; AND TWYMAN, ETC., ET AL. *v.* UNITED STATES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

Nos. 820 and 849. Decided January 15, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.